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No. 5534

TRANSCRIPT OF RECORD

In the

United States Court of Appeals

For the Seventh Circuit

No. 11456

SEAGRAM-DISTILLERS CORPORATION,
Plaintiff-Appellee,

vs.

NEW CUT RATE LIQUORS, INC., ET AL.,
Defendants-Appellants.

U. S. C. A.-7
FILED
NOV 27 1956
GEO. J. CARTER
CLERK

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED FEB. 13, 1956.
PRINTED RECORD.

In the

United States Court of Appeals

For the Seventh Circuit

No. 11685

SEAGRAM-DISTILLERS CORPORATION,
Plaintiff-Appellee,

vs.

NEW CUT RATE LIQUORS, INC., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of December (it being the 5th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 180th Year.

Present:

Honorable John P. Barnes, Chief District Judge.
Honorable William H. Holly, District Judge.
Honorable Philip L. Sullivan, District Judge.
Honorable Michael L. Igoe, District Judge.
Honorable William J. Campbell, District Judge.
Honorable Walter J. La Buy, District Judge.
Honorable J. Sam Perry, District Judge.
Honorable Win G. Knoch, District Judge.
Honorable Julius J. Hoffman, District Judge.
Roy H. Johnson, Clerk.
William W. Kipp, Sr., Marshal.

Monday, December 5, 1955.

Court met pursuant to adjournment.

Present: Honorable Julius J. Hoffman, Trial Judge.

2 UNITED STATES DISTRICT COURT

Northern District of Illinois.

Eastern Division.

Seagram-Distillers Corporation, *Plaintiff,*
vs.
New Cut Rate Liquors, Inc., et al., *Defendants.*
} In Equity No. 54 C 832

STATEMENT PURSUANT TO RULE 10(b) OF THE UNITED STATES COURT OF APPEALS, 7TH CIRCUIT.

On June 9, 1954, plaintiff filed its original complaint against New Cut Rate Liquors, Inc., an Illinois corporation, Thomas Pape, d/b/a/ Double Value Liquors, and Nick Pintozzi, d/b/a Double Value Liquors. The complaint alleged that jurisdiction was based upon diversity of citizenship and that the matter in controversy, exclusive of interest and costs, exceeded the sum or value of $3,000.00; that the plaintiff had no adequate remedy at law; that fair trade contracts were entered into covering certain brands of alcoholic liquors, pursuant to the provisions of the Illinois Fair Trade Act, and that the defendants (who are not signers of said fair trade contracts) had violated same.

On June 15, 1954, these defendants filed a verified answer with the Clerk of the United States District Court, denying all of the material allegations set forth in the complaint.

On June 15, 1954, subsequent to the filing of a verified answer by the defendants, plaintiff filed an amended complaint as a matter of course pursuant to Rule 15(a) of the Rules of Civil Procedure of the United States Dis-
3 trict Court, adding 45 additional retail liquor dealers, plus Foremost Liquor Stores, Inc., after which Judge Julius Hoffman issued a temporary restraining order without notice against all of the 49 defendants.

On June 16, 1954, Judge Hoffman vacated the temporary restraining order which he issued on June 15, 1954, acknowledging that same was improperly issued inasmuch as a responsive pleading was on file at the time that the

amended complaint was filed as a matter of course, and consequently plaintiff would have to obtain leave of court to file the amended complaint.

On June 16, 1954, Judge Hoffman gave leave to plaintiff to withdraw its amended complaint filed June 15, 1954, as a matter of course, and to re-file same instanter by leave of court, and further ordered that the answer filed for the original three defendants to the original complaint should be allowed to stand on behalf of all of the additional defendants in the amended complaint. Judge Hoffman then issued a new temporary restraining order, in spite of the fact that a verified answer was on file on behalf of all the defendants, which denied all of the material allegations set forth in both the complaint and the amended complaint. He further ordered that the hearing for a preliminary injunction be set for June 24, 1954.

On June 21, 1954, plaintiff filed a supplemental amended complaint to its amended complaint, adding three additional defendants, who are retail liquor dealers, to the present action, and the temporary restraining order applied to these additional defendants.

On June 24, 1954, Judge Hoffman extended the temporary restraining order to July 4, 1954, and set the hearing on the preliminary injunction motion for July 1, 1954.

4 On July 1, 1954, a hearing on plaintiff's motion for a preliminary injunction was held.

On July 2, 1954, Judge Hoffman issued an order granting plaintiff's motion for a preliminary injunction, and also made findings of fact with regard to the material allegations set forth in plaintiff's complaint, even though no competent evidence was introduced by plaintiff to overcome the denials of these material allegations which were set forth in the verified answer filed by the defendants.

On July 8, 1954, a Notice of Appeal was filed from the issuance of the order for preliminary injunction issued by Judge Hoffman on July 2, 1954.

On July 16, 1954, a Designation of Contents of Record and Statement of Points on Appeal was filed on behalf of appellants.

On July 28, 1954, an Amended Statement of Points on Appeal was filed on behalf of Appellants.

On September 11, 1954, Transcript of Record was filed.

On November 24, 1954, a brief was filed in the United States Circuit Court of Appeals for the Seventh Circuit on behalf of Appellants.

On December 28, 1954, a brief was filed in the United States Circuit Court of Appeals for the Seventh Circuit, on behalf of Appellee.

On January 13, 1955, a Reply Brief was filed in the United States Circuit Court of Appeals for the Seventh Circuit on behalf of Appellants.

5 On April 4, 1955, a decision by the United States Circuit Court of Appeals for the Seventh Circuit was rendered, affirming the order entered by Judge Hoffman on July 2, 1954, granting a preliminary injunction to the Plaintiff-Appellee. The Court in its decision stated in part as follows:

"While considerable evidence was received by the District Court, a final hearing upon the issues did not take place. The evidence was received so that the Court might have an opportunity to exercise its descretion upon the motion for temporary injunction. Its granting of such relief must be affirmed unless there is an abuse of discretion." *Doeskin Products v. United Paper Co.*, 195 F. 2d, 356, 360.

On April 18, 1955, a petition to the United States Court of Appeals for the Seventh Circuit for a rehearing was filed on behalf of Appellants, and on April 25, 1955, the petition was denied.

On June 11, 1955, a Petition for Certiorari was filed on behalf of Appellants, and a Brief in Opposition was filed in behalf of Appellee.

On October 10, 1955, the Petition for Certiorari was denied by the United States Supreme Court.

On November 26, 1955, a hearing on Plaintiff's motion for a permanent injunction was held before Judge Hoffman in the United States District Court for the Northern District of Illinois, Eastern Division.

On December 5, 1955, Judge Hoffman issued an order granting plaintiff's motion for a permanent injunction and also made findings of fact and conclusions of law with regard to the material allegations set forth in plaintiff's complaint.

On January 3, 1956, Notice of Appeal was filed by Appellants from the issuance of the order granting the permanent injunction issued by Judge Hoffman on December 5, 1955.

New Cut Rate Liquors, Inc. et al.,
Defendants,
By Schultz & Biro
Their Attorneys.

6 IN THE UNITED STATES DISTRICT COURT.
* * (Caption—54-C-832) * *

Be It Remembered, that on to wit, the 9th day of June, 1954, the above-entitled action was commenced by the filing of the Complaint in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division: in words and figures following, to-wit:

* * * * *

8 And afterwards on, to wit, the 28th day of November, 1955 came the Parties by their attorneys and filed in the Clerk's office of said Court their certain Stipulation in words and figures follows, to wit:

9 UNITED STATES DISTRICT COURT.
* * (Caption—54-C-832) * *

STIPULATION.

It is hereby stipulated by and between the plaintiff and all of the defendants herein, through their respective attorneys, that:

1. Plaintiff is a corporation duly created and existing under the laws of the State of Delaware and a citizen of said State, and is engaged in the business of selling and distributing alcoholic beverages, of standard quality, throughout the United States under the trademarks, brands and names of the producers thereof and is duly licensed to engage in such business in Illinois.

10 2. Plaintiff is, and at all times mentioned in the complaint has been engaged throughout the United States and Illinois, in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagream & Sons, Inc., and corporations affiliated with said corporations. Said beverages (sometimes hereinafter referred to as "Seagram products") include Seagram's V. O., Seagram's Seven Crown Blended Whiskey

and Seagram Ancient Bottle Gin, and are sold in various sized bottles, the labels or containers of which bear the trade-marks, brands or names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc. or of corporations affiliated with said corporation, which are the producers thereof. Each of the beverages is, and during all of the times mentioned in the complaint was, in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed throughout Illinois. Plaintiff herein has for several
11 years prior to the dates mentioned in the complaint expended large sums of money in advertising Seagram products and during the past several years plaintiff expended for such purpose an amount in excess of Five Hundred Thousand Dollars ($500,000.00) in Illinois alone, and the trade-marks, brands or names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois and plaintiff has sold large quantities of each of said products in Chicago and throughout Illinois.

3. Plaintiff is and continuously, since long prior to the dates mentioned in the complaint, has been the sole person authorized by the producers of Seagram products to sell and distribute said products in Illinois, and has during all of said time made sales of said products to various wholesale distributors throughout Illinois.

4. Plaintiff has executed so-called Fair Trade contracts with large numbers of retailers of alcoholic beverages
12 in Illinois. A copy of the form of said executed contracts is attached hereto as Exhibit A.

5. Prior to June 15, 1954 all of the defendants herein had been informed and were aware of the Fair Trade prices for plaintiff's products.

6. On June 15, 1954 all of the defendants advertised and offered for sale in the Chicago Sun Times, a newspaper of general circulation in the city of Chicago, Seagram's Seven Crown Blended Whiskey at $3.49 a Fifth when the Fair Trade price was and is $4.30, and Seagram's V. O. at $4.89 a Fifth when the Fair Trade price was and is $5.98.

7. Within the Chicago metropolitan area, there are 4,873 retail outlets for bottled alcoholic beverages.

8. The transcript of record filed in the United States Court of Appeals for the 7th Circuit upon defendants' appeal from the preliminary injunction entered herein (Case No. 11275), shall be considered part of the record in this hearing.

Louis A. Kohn,
Patrick W. O'Brien,
Attorneys for Plaintiff.

Allen H. Schultz,
Louis A. Biro,
Attorneys for Defendants.

Exhibit A.

This agreement, made this ..... day of....., 195....., between Seagram-Distillers Corporation, a corporation with an office and place of business at 35 East Wacker Drive, Chicago, Illinois, hereinafter called "Owner", and of Illinois, hereinafter called "Retailer",

Witnesseth:

Whereas, the Owner is engaged in the business of distributing alcoholic beverages in the State of Illinois produced by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and affiliated corporations, which beverages are advertised, distributed and sold under and bear trade-marks, brands and names of said corporations and affiliated corporation, and/or the trade-mark, brand or name of Owner, and

Whereas, said beverages are in fair and open competition with commodities of the same general class produced by others, and

Whereas, the Owner and the Retailer desire to avail themselves and the public of the benefits of The Fair Trade Act of Illinois (Senate Bill 598, Laws of 1935 amended by House Bill 230) and to avoid having such trade-marked and branded articles made the subject of injurious and uneconomic practices and to avoid the depreciation of or damage to said trade-mark, brands or names through such practice,

Now, Therefore, the parties hereto agree as follows:

First: Retailer will not sell, advertise, or offer for

sale within the State of Illinois any beverages distributed by Owner and bearing the trade-mark, brand or name of Owner or the producer thereof, which the Retailer has purchased, or now has on hand, or which Retailer may hereafter purchase, at prices differing from the prices stipulated from time to time by Owner for sales to the public, nor will he make any refunds, discounts, or concessions of any kind or character for the purpose of, or which will result in varying the said stipulated prices, nor sell or offer to sell any of such beverages in combination with any other beverages at a single or joint price.

Second: The resale prices of said beverages by Retailer to Consumer shall be in accordance with respective
16 written schedules thereof furnished from time to time by Owner to Retailer which schedules are to be considered a part of this contract. The schedule last delivered by Owner to Retailer shall govern the resale price at the time each particular resale is made. Owner reserves the right from time to time, upon five (5) days written notice to Retailer, to change said prices, to add additional items to said schedule or to remove any item therefrom.

Third: Inasmuch as it would be impracticable or extremely difficult to fix the damage which may be sustained by Owner by reason of a breach of this contract by Retailer, it is agreed that the Retailer shall pay to the Owner as liquidated damages, the sum of Fifty ($50) dollars for each breach of his contract. It is further agreed that the Owner, in addition to all other legal rights and remedies shall be entitled to injunction relief against any and all breaches of this agreement by Retailer.

Fourth: This contract will expire in one year from the date hereof, but shall be renewed from year to year unless at any termination date both of the parties hereto
17 indicate in writing their desire not to have the contract renewed. Owner reserves the right to cancel this agreement on twenty-four hours written notice.

This contract supplements and does not supersede any previous Fair Trade contracts made by Owner pursuant to said Fair Trade Act and/or any other statute of the State of Illinois: Provided that the validity and effect of this contract is not and shall not be dependent upon the existence of any other such contract.

In Witness Whereof, the parties hereto have caused this contract to be executed the day and year first above mentioned.

Seagram-Distillers Corporation,
By

Retailer,

By

18 And afterwards on, to wit, the 13th day of February, 1956 there was filed in the Clerk's office of said Court a certain Transcript of Proceedings had on November 28, 1955 and December 5, 1955 Before the Honorable Julius J. Hoffman Judge in words and figures following, to wit:

20 THE UNITED STATES DISTRICT COURT.

* * (Caption—54-C-832) * *

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled case before the Honorable Julius J. Hoffman, one of the Judges of said court, sitting in his court room in the United States Court House, Chicago, Illinois, on November 28, 1955, at 10:00 o'clock a. m.

Appearances:

Mr. Louis A. Kohn and Mr. Patrick W. O'Brien, representing the Plaintiff;

Mr. Louis L. Biro, representing the Defendant.

21 The Clerk: 54 C 832. Seagram Distillers, Corporation *vs.* New Cut Rate Liquors, Inc., cause on trial.

The Court: Mr. Kohn, we got to you a little sooner than we thought we could.

Mr. Kohn: All right. We tried this case originally on a temporary injunction, I think, around July, 1954, the weather was in marked contrast to the weather today, as I recall it.

Since that time, the defendant, represented by Mr. Biro and Mr. Schultz, appealed to the Court of Appeals, raising a number of questions, and the decision of Your Honor

was affirmed. Then the appellant filed a petition for rehearing, limited to the sole question of whether or not $3,000 was involved.

The rehearing was denied, and counsel then filed a petition for certiorari, to the Supreme Court of the United States, raising all the points that were raised in the Court of Appeals, and added one more point, namely, that your Honor should have remitted the case to the State Court because there was a question of validity of the Illinois Fair Trade Act under the Illinois constitution.

Is that right, Mr. Biro?

Mr. Biro: We did take the position that the case should have been remitted. We question the validity of
22 the Act.

Mr. Kohn: Although that never was raised before your Honor certiorari was denied by the Supreme Court of the United States. I think on the same day certiorari was also denied in the case coming up from the Fifth Circuit involving the Louisiana Fair Trade Act, although I do not believe the same questions were raised in that case.

So we are now here today on a motion for a permanent injunction, and in order to save the time of the Court and to shorten the record, we have entered into certain stipulations. First, in order to avoid unnecessary duplication in the record, there has been a stipulation that all the testimony that was taken here in June or July of 1954 should be used here, and a number of shopping surveys have been made by both sides, and in order to save the time of the Court, there have been summaries prepared and Mr. O'Brien will now offer the stipulation in evidence.

The Court: Do you want to read it or just hand it up?

Mr. Kohn: Hand it up, I believe.

There have been some recent cases. There has been a Supreme Court of Pennsylvania case that sustained the constitutionality of their Fair Trade Act, but the
23 law is substantially in the same state as it was when we argued it before your Honor before.

The Court: Anything further for the plaintiff, Mr. O'Brien?

Mr. O'Brien: Your Honor, I would like to have the reporter mark these documents that I have before me, copies of which have been supplied to the defendant, as Plaintiff's Exhibits 1 for identification through 5 for identification.

(Said documents were marked Plaintiff's Exhibits for identification, respectively, 1, 2, 3, 4 and 5.)

Mr. O'Brien: Your Honor, at this time, pursuant to the previous understanding with counsel for the defendant, the plaintiff will offer Plaintiff's Exhibit 1 for identification into evidence as Plaintiff's Exhibit 1.

Plaintiff's Exhibit 1 is entitled "Tabulation of Recent Market Evaluation for Seagram's Products, by American Protective Service, Inc.," and is 24 pages long.

The Court: You say that is offered on stipulation?

Mr. Biro: That is correct, your Honor.

The Court: Then, by stipulation, Plaintiff's Exhibit 1 for identification will be received into evidence as
24 Plaintiff's Exhibit 1.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 1.)

Mr. O'Brien: At this time, the plaintiff would like to offer Plaintiff's Exhibit 2 for identification into evidence as Plaintiff's Exhibit 2. This is also pursuant to agreement with defendant's counsel.

Plaintiff's Exhibit 2 is a summary of the tabulation set out in Plaintiff's Exhibit 1.

The Court: By agreement, Plaintiff's Exhibit 2 for identification will be received into evidence as Plaintiff's Exhibit 2.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 2.)

Mr. O'Brien: We also offer Plaintiff's Exhibit 3 for identification into evidence as Plaintiff's Exhibit 3.

This exhibit is marked—is a memorandum of Fair Trade enforcement cases initiated by Seagram since April 30, 1954, a 5 page document. This is also pursuant to agreement with defendant's counsel.

The Court: By agreement, Plaintiff's Exhibit 3 for identification will be received into evidence as
25 Plaintiff's Exhibit 3.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 3.)

Mr. O'Brien: We further offer Plaintiff's Exhibit 4 for identification into evidence as Plaintiff's Exhibit 4, also by agreement.

Plaintiff's Exhibit 4 is a 3 page affair entitled "Fair Trade Enforcement Cases (Contempt)," brought by plaintiff since April 30, 1954.

Mr. Biro: By agreement.

The Court: By agreement?

Mr. Biro: Yes, sir, your Honor.

The Court: By agreement, Plaintiff's Exhibit 4 for identification will be received into evidence as Plaintiff's Exhibit 4.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 4.)

Mr. O'Brien: We also offer at this time Plaintiff's Exhibit 5 for identification into evidence as Plaintiff's Exhibit 5.

Plaintiff's Exhibit 5 for identification is a summary of Fair Trade enforcement litigation by plaintiff since April 30, 1954. This is also by agreement with counsel
26 for the defendant.

The Court: By agreement, Plaintiff's Exhibit 5 for identification may be received into evidence as Plaintiff's Exhibit 5.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 5.)

Mr. O'Brien: At this time, we would like to bring some of the more pertinent sections of these summaries to the Court's attention in this exhibit.

Mr. Biro: Your Honor, if I may—I didn't want to interrupt Mr. O'Brien, I didn't realize what he was doing.

I would like at this time, if I may, to make a motion, and I feel that I should make this motion prior to the time the plaintiff gets through, as I did not want to interrupt; if I may have leave of Court to address the Court for a moment.

The Court: Is there any objection?

Mr. Kohn: No objection.

Mr. Biro: The defendants in this matter move the Court to remit this matter to the state court on the basis that there is a state statutory construction question involved here. That is the question as to whether or not the particular Fair Trade contract involved here
27 conforms with the vendee-vendor relationship as required by the Illinois Fair Trade Act.

In addition to that, your Honor, there is a constitutional law question of the state involved, based upon, if your Honor remembers, the argument at the last trial of the Grace and Robinson *vs.* United Georgia decision on the basis that the Illinois Fair Trade Act, that is as it exists now, was passed prior to the Miller Tydings amendment, also prior to the Maguire Amendment, and thus, we feel

that in order for the Fair Trade Act of this state to have any life breathed into it, if you will, it would be necessary for the state legislature to re-enact this legislation so as to get the benefit of the Federal Enabling Act.

On that basis, we move that this honorable Court remove this matter to the state court.

The Court: Before ruling on the motion, Mr. Kohn, do you wish to be heard on it?

Mr. Kohn: If the Court please, that matter was covered on the petition for certiorari, in opposition to the defendant's petition for certiorari in which we pointed out to the Court that the doctrine of remission did not apply in this particular case, and secondly, that these Illinois questions have been decided authoritatively by the
28 appellate court in Chicago in *Sunbeam Corporation v. Federal Housekeeping Mart*, 2 Ill. App. 543.

We will hand you our objections to the petition for certiorari at the close of this case in the event you desire to hear argument.

The Court: Am I not bound by the order denying the petition for certiorari since that question was raised in your petition?

Mr. Biro: I think not, your Honor, because of the fact that the big point in the court below was one, if your Honor please, if your Honor remembers, was at your Honor's discretion. It was the motivating force in the initial instance because of the fact it was not of a permanent nature.

Secondly, as I remember—

Mr. Kohn: They did not argue it in the Court of Appeals, and they waited now, to 1954, to raise this point before you.

Mr. Biro: Your Honor, this has nothing to do with the prior matter. We are here on a hearing for a permanent injunction.

Mr. Kohn: You didn't file any pleading on this point.

Mr. Biro: I have a right to make a motion, have I not, your honor? I have made a motion for the record.
29 The Court: You may make any motion you like, and we will do our best to rule properly on it.

Before you proceed, is there any pleading which you have filed which raises the point which we are now about to argue?

Mr. Biro: Not until we filed the petition with the Supreme Court of the United States.

The Court: Well, here, now.

Mr. Biro: No, sir. This is the first time we are raising that matter.

The Court: Is that your argument?

Mr. Biro: Well, if the Court please, the basis of the motion is the two decisions of the Supreme Court of the United States, namely, *Railroad Commission* v. *Pullman Company*, reported in 312 U. S. 496, and *Chicago* v. *Fieldcrest Dairies*, reported in 316 U.S. 168.

The Court: Are you reading from your petition you have prepared?

Mr. Biro: Yes, I am using it.

If I may ask your indulgence to read one short paragraph, your Honor, I am sure that you have either read this or at least have it in the files.

The Court: I have never seen the petition.

Mr. Biro: In the Fieldcrest case, your Honor, the
30 court, at page 171, is quoted as follows:

"We doubted we granted the petition for certiorari because of the doubtful propriety of the district court and of the circuit court of appeals undertaking to decide such an important question of Illinois law instead of remitting the parties to the state courts for litigation of the state question that is involved in the case."

Then the citation that the Supreme Court uses is *Railroad Commission* v. *Pullman Company*, 312 U. S. 496, which is the other case I cited.

The Court: What was the reply of the respondents there, the plaintiff here, in their answer? What I want to get at is may I not assume here that the Supreme Court in denying your petition for certiorari passed on the point? Must I not assume that, counsel?

Mr. Biro: I assume that they were aware of the point. Let me put it on that basis, your Honor.

Mr. Kohn: Do you want to know what our answer is?

The Court: I would like to hear it.

Mr. Kohn: We stated, in opposition to the petition, that those two cases involved troublesome Federal con-
31 stitutional issues which could be obviated by an authoritative determination of state questions which were also troublesome.

In the Fieldcrest case of considerable complexity here, we say there is no Federal constitutional question, and no difficult question of Illinois law because first we have the old Dearborn vs. Seagram case which did sustain the

constitutionality, not exactly the point we are raising here, but then we have the recent case, I think it is the opinion of Judge Kiley in the *Sunbeam Corporation* v. *Central Housekeeping Mart,* 2 Ill. App. 2d 543, and we do have the Supreme Court decisions of some major states where the same point was raised and rejected by the courts there.

Mr. Biro: Your Honor, the point here is it is not a question of how troublesome this becomes to the Federal Government. The basic question here, is this a question of state law? Is it a question that the Supreme Court of the State of Illinois should determine on the basis determining the state statutes, if you will, or the constitutional question of interpreting that which has already been passed?

Mr. Kobr: I just want to say one more thing. This
32 question of the Maguire Act, the effect of the Maguire Act, has been—counsel has been aware of it for years. They represent many clients in this field. They have not seen fit to go into any Illinois court for a declaratory judgment or otherwise to get the question determined.

I think this is purely dilatory at the last minute, a technicality at the most, which they didn't raise in the Court of Appeals, and I don't believe it is fair to the Court at this late juncture to raise it here.

The Court: Anything further?

Mr. Biro: That is all, your Honor.

The Court: The motion of the defendant to remit this case to the state courts, Mr. Clerk, the Illinois state courts, will be denied.

All right, Mr. O'Brien.

Mr. O'Brien: May it please the Court, before we proceed with our two witnesses, I would like to bring to the Court's attention the contents particularly of Plaintiff's Exhibit 2 and Plaintiff's Exhibit 5.

The Court: By any chance, do you have copies of your exhibits?

Mr. O'Brien: Yes, sir.

33 The Court: So that I can follow them. It is not necessary, but I like to have one before me. If you need these as you go along, I will hand them back to you, Mr. O'Brien.

Mr. O'Brien: No, sir, I have plenty of them, your Honor.

I would like to particularly just mention the summary

of Fair Trade enforcement litigation by plaintiff since April 30, 1954.

The Court: That is No. 5?

Mr. O'Brien: That is No. 5.

This exhibit condenses the contents of Exhibits 3 and 4, and we have on behalf of Seagram sued in these courts since April 30, 1954—we have brought actions against liquor store defendants for injunction against 113 different liquor stores. That was in a total of 29 cases.

Those 29 cases resulted in Seagram obtaining injunctions against 107 of those 113 liquor store defendants. This figure of 107 includes both preliminary and permanent injunctions.

We have initiated 15 separate contempt actions since April 30, 1954 on behalf of Seagram against stores which already had an injunction outstanding against them.

34 Twelve of those contempt actions have resulted in a finding of guilty, and more detailed consequences are set out in the other exhibits.

There are two contempt actions pending. One contempt action was dissolved upon the filing of an affidavit of the particular defendant that the sale involved had been a mistake, and there would be compliance in the future.

So much for litigation.

In November of this year, a survey was conducted by the Merit Investigative Agency. 284 separate liquor stores in Chicago area were shopped for Seagram products, and of these 284, originally 41 violations were found. The ratio of 41 to 284 is 14 per cent violations and 85 per cent compliance.

The exhibit also demonstrates there was a reshopping of the violators and nine second violations were found. The total ratio of stores shopped and reshopped to stores found in violation was some 4 per cent, and the percentage of compliance after reshopping was 96.8 per cent.

Now, we have a witness in court this morning we would like to put on the stand very briefly to tell about this market survey conducted in October and November

35 for Seagram products.

The Court: Call any witnesses you like.

Mr. O'Brien: Mrs. Wassmundt.

MILDRED WASSMUNDT, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. O'Brien.

Q. Would you state your full name, please?
A. Mildred Wassmundt.
Q. Will you spell your last name?
A. W-a-s-s-m-u-n-d-t.
Q. Where do you live?
A. 3223 Home Avenue, Berwyn.
Q. What is your occupation or profession?
A. I am president and general manager of the Merit Protective Service, Incorporated.
Q. Will you please tell the Court, Mrs. Wassmundt, just what the Merit Protective Service is?
A. We are a detective agency specializing in shopping service.
Q. How long has the Merit Protective Service, Inc. been engaged in those various functions?
36 A. Since 1925.
Q. How long have you been with Merit?
A. Approximately 11 years.
Q. Did you state your present capacity with Merit?
A. Yes, I am president and general manager.
Q. How long have you served as president and general manager?
A. Since February of this year, 1955.
Q. How long have you been with Merit?
A. About 11 years.
Q. Mrs. Wassmundt, will you tell the Court, please, in what capacity or capacities you have served with Merit during those 11 years?
A. In practically all capacities, shopper, service manager, manager, vice-president and president, supervisor.
Mr. Kohn: Will you speak a little louder, Mrs. Wassmundt?

By Mr. O'Brien:

Q. Mrs. Wassmundt, will you state briefly just approximately how many employees Merit maintains on a permanent basis?
A. From 10 to 20, depending on the time of the year.

Q. Would you care to state, Mrs. Wassmundt,
37 briefly, without revealing any professional secrets; any of the firms for which Merit does perform this specialized shopping service function?

A. Well, of course, there are numerous accounts, but most of our work is done under long terms. We have clients such as Montgomery Ward, Steinway and Ford-Hopkins—

The Court: If you don't want to tell the names, will you concede, counsel, that they have many other representative clients?

Mr. Biro: We do, Your Honor. We told Mr. Kohn and Mr. O'Brien we would stipulate.

The Court: All right, that is stipulated then that Mrs. Wassmundt's firm serves many large companies, is that right?

The Witness: Yes.

By Mr. O'Brien:

Q. Mr. Wassmundt, has the Merit—you were in court here and heard the stipulation about the shopping done by Merit for Seagram in October and November?

A. Yes.

Q. I would like you to briefly tell the Court, Mrs. Wassmundt, just under what circumstances the shopping was done, how it came about, and how it was performed.

38 A. Well, early in October of this year, I received a call asking me to meet with Mr. Kohn and Mr. O'Brien in their office. At that time, they explained to me that they were interested in a shopping survey being made for Seagram and at this time they asked me to present our qualifications, also the availability of our employees to do a concentrated job in a short length of time.

We discussed the various methods that we used and how we felt a fair trade should be handled, at the conclusion of which they asked that we start this survey for Seagram, and asked that we do, within the next week, if possible, at least 100 shoppings, and these stores and addresses were to be chosen at our discretion, and were to cover a cross section of metropolitan Chicago.

We started immediately, and at the conclusion of the first 100 we contacted Mr. O'Brien and gave him the results. We also sent in affidavits and reports, and at this time Mr. O'Brien asked that we re-shop all violations, which we did.

We then continued with another 100 and within three weeks we did approximately 300, all of which were
39 stores and addresses which we picked, trying to get a general coverage of the city by location.

Mr. O'Brien: We have no further questions.

The Court: Mr. Biro.

Mr. Biro: No questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. O'Brien: At this time, we would like to call Mr. William Teece.

Mr. Kohn: He was sworn over a year ago. I don't know whether that is retroactive and applies for today.

The Court: We will make it safe by swearing him.

WILLIAM R. TEECE, called as a witness herein on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. Are you the same Mr. William R. Teece who testified in this same courtroom in this same matter on July 2, 1954?

A. I am.

The Court: Do you mind spelling your name for the reporter, and incidentally, for me?

40 The Witness: William R. Teece, T-e-e-e-e.

By Mr. O'Brien:

Q. Just again, for the sake of clarification, you are—

A. Vice-President in charge of Seagram. Vice-President in charge of sales for the entire Central Division of the company.

Q. Does that include Chicago, I take it?

A. That is right.

Q. Mr. Teece, would you bring the Court and counsel for the defendant up to date with respect to what the Seagram organization has been doing with respect to Fair Trade and fair trade enforcement?

The Court: I would imagine that counsel is already up to date, but bring me up to date.

Is that right, Mr. Biro?

Mr. Biro: I hope so, your Honor.

By Mr. O'Brien:

Q. Just what have you been doing, or your organization, been doing since July 2, 1954?

A. Your Honor, we have a list of salesmen in the City of Chicago running materially between 30 and 33, with the exception of about 3 of those men 30 of those men are constantly on the streets.

41 Those men have, as their primary duty, to call on retail accounts, and one of the first things they go in to talk to a retailer about is our policy which the world knows is fair trade, and the maintenance of price.

These men will make an average of about 5 or 6 calls a day, simply because we ask them to do their job thoroughly. They check in reference to price, and they talk with retailers. Oftentimes they discuss about somebody down the street that is cutting prices, and we try to get our men to go right back into these places, these same places, to see what can be done.

Our men talk fair trade; they believe in it and each day they go out—we are running at about 190 calls a week, checking fair trade in the City of Chicago. Now I mean 190 different stores. I don't mean just running around and back to one store after another.

These men are constantly on the alert. We follow through with these men every time we have a meeting, which is the duty of the State Manager of the City of Chicago and Cook County, and his assistant, to bring up at that time any question that any man wants to know with refer-

42 ence to the enforcement of fair trade in the City of Chicago.

We, at times, in order that I am not perfectly satisfied with what is going on, and I believe nobody, when it comes to fair trade until I actually see what it is all about. We give to our Chicago manager and his assistant specific instructions to allow the men to go out and make purchases wherever they find violations, or whether they find violations or not.

And at periodical times, they go out and mak , I should say at the rate of once a month, and even more than that during the last three or four months and particularly around the Holiday time, they make purchases to the tune of $500 and $600 a week, the entire sales force, whiskey, we find—some we find violations, but 80 to 90 per cent we find are nonviolators.

We are no respector of any retail account at all. We just go ahead and make the calls as we find them.

Q. Mr. Teece, what would you say the major source of possible fair trade violations is? Is it what a man sees when he goes into one store, or is it what he hears
43 about store B when he goes into store A?

Mr. Biro: I object to that, if the Court please.

The Court: How is that getting down to the issues in this particular case, Mr. O'Brien?

Mr. O'Brien: Well, your Honor, a point being—and perhaps it has been covered, it was commented on at the last hearing here, I believe, by counsel for the defendant. that surveillance by Seagram's own people in a particular store, of that particular store, they said did not constitute sufficient surveillance.

I just want to bring out the point that the sources of information are not limited to what the salesmen or the missionary men see when they go into Store A. It is also what they hear about store A when he is in store B.

The Court: What do you think as to that, Mr. Biro?

Mr. Biro: If the Court please, Mr. O'Brien, as I
44 understood the question—I may have misunderstood it—

The Court: Let us have it read for you, if you don't understand it.

Will you read the question?

(Last question read.)

Mr. O'Brien: Your Honor, perhaps I can rephrase the question.

The Court: Do you withdraw the question?

Mr. O'Brien: I withdraw the question.

The Court: You will ask another question.

By Mr. O'Brien:

Q. Mr. Teece, will you tell the Court, please, what, in your opinion, is the major source of suspected fair trade violations so far as Seagram is concerned as a source of information?

The Court: You may answer that question.

By the Witness:

A. The major source that we have is the fact that we have constantly coming into our office reports of fair trade violations. I would say there is not a day that we do not get from 15 to 20 retailers calling about somebody else that is cutting prices.

There is a general market condition that we follow because when we actually do know that violations are
45 continually going on on other brands of merchandise, we naturally suspect that they may be doing the same thing with us.

So, when our men go out, they have strict instructions to pay only attention to Seagram and their fair trade prices.

By Mr. O'Brien:

Q. Mr. Teece, you may just emphasize a point that is already in the record here.

Does or does not Seagram have fair trade prices established for case lots?

A. They certainly do.

Q. Is the policy of Seagram organization with respect to fair trade any different—

A. No, it is the same thing, exactly. It is fair trade.

Q. Mr. Teece, have you encountered in your experience in supervising of Seagram's trade, fair trade, program, any difficulty with respect to the enforcement of fair trade price per case?

A. Well, in answer to that question, I don't know just what you mean by "encountered any difficulty." It is true that in reference to fair trade prices, in regard to cases, fair trade, as near as I can represent, and as near as I know from my 18 years with Seagram, and my six
46 years with another firm, constitutes about 5 per cent of the total sales of our product in the market.

So consequently we are looking at 95 per cent of our market that is always good and we are looking at 5 per cent that is bad. The opportunity to find and to hear of violations in case prices is much less than it would be on the bottle price.

I hope that answers your question.

Mr. Biro: Your Honor, I ask that the answer be stricken as not responsive to the question.

The Court: I am inclined to agree with you. I will allow the motion.

Mr. Biro: I don't mind a little eulogy as we go along.

The Court: There were a few gratuitous observations.

Mr. Biro: Yes.

The Court: I will strike the answer as not being responsive.

Do you want to take another try at the answer, Mr. Teece?

By Mr. O'Brien:

47 The question was, Mr. Teece, have you, as the supervisory person in charge of enforcing Seagram's fair trade policy on both bottle and case in this area, encountered any difficulty?

A. No.

Q. With respect to this case prices?

A. No.

Q. Your policy is the same.

A. Absolutely.

Q. Are reports received with respect to case violations with the same frequency that you receive reports of bottle violations?

A. We do not.

Q. When you receive reports of case violations, is your follow-through any different?

A. It is. It is no different only we get busy on it right away.

Q. Now, Mr. Teece, you say you have been with Seagram in the sales department for how many years?

A. 18 years.

Q. During that time, have you had pass through your hands various sales reports with respect to the Seagram products?

A. I have, all of them.

48 Q. Have these reports you have seen during the last 18 years established any ratio of the sales of Seagram products in case lots to the sale of Seagram products in bottles?

A. I would say—

Mr. Biro: I object to that question.

The Court: You mean in the aggregate?

Mr. O'Brien: No, I am asking him, based on his 18 years' experience, seeing reports.

The Court: You mean actual sales or fair trade law alleged violations?

Mr. O'Brien: No, sir, I am referring to sales.

The Court: Without regard to sales?

Mr. O'Brien: I am not thinking of fair trade at the moment.

The Court: What is the materiality?

Mr. O'Brien: It will develop, your Honor.

The Court: What is your objection?

Mr. Biro: My objection, your Honor, is, it would seem to me, with due reference to Mr. Teece as the administrator for the Seagram Company, I don't think that Mr. Teece is qualified to say that "X percentage of our
49 goods are sold in case lots as opposed to bottle goods." There is no criterion, if the Court please.

The Court: If a vice-president in charge of sales in a large regional area cannot say that, who in the company could?

Mr. Biro: I don't think anybody can, your Honor. That is my point.

Certainly a—

The Court: If that is your objection, I overrule it. I will let the witness answer. If he doesn't know, he may say so. If he does, then he is qualified.

Mr. Biro: My question, then, your Honor, is, Does the witness know, or is he going to hazard a guess of what he thinks might be so? There is no way to—

The Court: If he makes a guess, and—you may then move to strike his answer. If he answers the question factually, I will let it stand.

You may cross examine him on it. You may answer, Mr. Teece.

50 By the Witness:

A. To my knowledge, less than 5 per cent of our merchandise is sold at retail prices by the case.

The Court: It is a poor man's whiskey?

The Witness: We believe so, and we believe that poor men keep us in business.

Mr. O'Brien: That is all.

The Court: Any cross examination?

Mr. Biro: If I may, please.

Cross-Examination by Mr. Biro.

Q. Mr. Teece, when you first went on the stand, you spoke of your salesmen who are out on the street and also make the shoppings and carry on discussions with retailers. The primary job of those men is actually salesmen, is that correct?

A. They are hired as salesmen.

Q. They are hired as salesmen?

A. Yes, sir.

Q. And you also made the statement that between 80 and 90 per cent of the stores in which they went they found compliance, is that correct?

A. That is right—I don't believe I made that state-
51 ment. I don't believe I made that statement, though.

Mr. O'Brien: I don't believe that was his statement.

The Witness: No, I didn't.

Mr. Biro: I think if you will look at the record, I think that you will find that Mr. Teece—

Mr. Reporter, would it be possible for you to see if Mr. Teece did not make a statement like that?

Mr. O'Brien: He said 85 per cent came from our exhibits.

The Court: 85.56 per cent is the last item under original shopping in Plaintiff's Exhibit 2, which is a summary of the Merit survey.

Mr. Biro: I am aware of that, your Honor.

The Court: I think probably that is what you are referring to. I do not have the impression that the witness mentioned that figure.

Mr. Biro: I think he did. May I have leave to ask the reporter to look it up?

The Court: Oh, yes, if the reporter can find it.

(Record read.)

52 Mr. O'Brien: Then I stand corrected.

By Mr. Biro:

Q. Now, Mr. Teece, the plaintiff and the defendant here have agreed that there are approximately 4,800 or 4,900 retail licenses in our area who fall within the group of people whom we are discussing, people who sell package goods.

Now, if we take the 4,800 as the figure, that would mean that, using your figure, approximately each week, 75 violators are going to be found and that is on the basis of your own shopping by your own men.

Yet the figures supplied by your attorney do not indicate anywhere near that number of violators. How do you account for the discrepancy?

A. That is the question you want me to answer?

Q. Yes.

A. In the first place, we do not accept—

Mr. O'Brien: I object. The figures are in the record.

The Court: I think that is argumentative.

Mr. O'Brien: They are all calculated.

Mr. Biro: If I may, your Honor, Mr. Teece was put on the stand—

The Court: Put your question more simply so
53 that it does not have any argument. You can develop it figure by figure. If there is any important conclusion that can be drawn from the figures, I will try to draw them.

By Mr. Biro:

Q. Mr. Teece, when your salesmen report violations to you or to someone under you, what do you do with the reports?

A. We turn them right over to our attorney.

Q. You turn them over to your attorney?

A. That is right.

Q. What do you instruct your attorney to do?

A. To prosecute as quick as possible.

Q. To prosecute as quick as possible?

A. Yes.

Q. Does Seagram follow up on the instructions that are given to your counsel as to what to do with those violation reports?

A. Your question again?

Q. My question is, after you turn these matters over to Mr. Kohn or Mr. O'Brien or someone else at the Mayer Friedlich firm, do you follow through to see what they do with it?

54 A. Very definitely.

Q. Now, my next question is, do they follow through on all of these violations that you give to them?

A. To my knowledge, with a stipulation that maybe in one occasion or two, somebody will sign a paper that they will cease violations and prosecution will stop at that particular time.

Outside of that, I think that they follow through.

Q. If that is so then, sir, how do you account for the discrepancy in the number of violations that you claim you found and the number of suits filed by your attorneys?

A. How do I account for that?

Q. Yes.

A. You would have to ask the attorneys.

Q. Well, if I take your figures and say that 90 per cent—we will use your figure, sir—you say between 80 and

90. I won't take the 84.5. I will say 90 of the people are in compliance. That would mean 10 per cent were not.

A. Yes, sir.

Q. As I figure, on the figures that we have agreed upon, that would mean that there are approximately 48 or 50 violations that would be found, let us say each week on that basis.

You say over a period, in your other testimony, for the past three months, that you have been shopping very regularly to the tune, as I believe you put it, of approximately five or six hundred dollars a week.

A. Why do I have to base my answer on your statement that there is only 4500 licenses when we have got 9000?

Q. Well, if I may—

Mr. O'Brien: Well, Mr. Teece, there is a stipulation in the case that within the City of Chicago area—this stipulation is based on the figures supplied by the Chicago Tribune that there are 11,000 retail licenses in the Chicago area.

Counsel worked out the figure of 4,873 retail outlets for bottle goods. For the purpose of this case we can accept that figure as 4800.

The Witness: The only thing that I can say then is that I would like to correct my statement because of the fact when I put 33 men out there, put out in Cook County, they are not only put out in the 4500 which you cover here. In other words, our men go to all the outlying towns in Cook County, and those men have licensees out there that they cover right along with the same instructions all the way through.

Of these 4500 you are talking about, we may have only 15 or 20 covering 4500.

Mr. Biro: For the sake of clarification, Mr. O'Brien, the figures that we have were for the metropolitan area which takes in the suburban area, is that correct?

Mr. O'Brien: It takes in the Chicago area, what the Tribune calls the "Metropolitan Area of Chicago." That may or may not include Cook County. I frankly don't know.

The whole thing was left—what we have stipulated to is that within the Chicago metropolitan area, based on figures provided by the Tribune. There are 4,873 retail outlets, for bottled beverages.

I don't think anyone here, least of all Mr. Biro, or

myself, are in a position to define the Chicago Tribune's definition of the Chicago metropolitan area. I think we will have to leave that as it is.

By Mr. Biro:

Q. Mr. Teece, may I ask you, in answer to the question Mr. O'Brien put to you, referring to the percentage of case goods sales which take place with your product with relation to the number of bottle goods sales of your product, I am assuming you are talking about your product after it leaves the retailers' premises, you made the answer, as I understood you, that to your knowledge approximately 5 per cent of your sales are in case lots, and 95 per cent would be in bottled goods.

May I ask how you arrived at that knowledge?

A. Well, constant surveillance of stores, merchandise sold to stores, and bottle sales to stores.

Q. May I ask how you know what bottle sales any given retailers make, or that retailers in Cook County make?

A. By checking with our men. We are very well familiar with people who sell by the case in the City of Chicago. Our men are familiar with those who sell by case. In fact, a great many people advertise by the case.

Q. I will grant that, sir. But by the same token, under the laws of both the state and the Federal government, anyone who has the necessary local and state license and has the necessary Federal tax stamp, if he is a retailer, he can make sales in any quantity.

A. That is right, but there is a set standard. When you go to a retailer, you will find he is either a fellow who is taking care of the territory or he is a case seller who sends out letters all over to inveigle a fellow to buy by the case, and I find that 90 per cent of the fellows are not fellows who send out dodgers to get the fellows to buy by the case but to take care of the territories in which they operate, and that is necessarily by the bottle rather than by the case.

Q. In other words, what you are predicating your answer on is the fact that approximately only 5 per cent of retail licensees make an effort to buy—

A. No, I am not predicating my answer only what I believe are actual results of our sales to the retailers.

Q. You mean, your discussions of your salesmen with retailers?

A. That is right. Not only discussions with my salesmen, but discussions with our wholesalers we use in the market.

59 Mr. Biro: That is all.

The Court: Is there and redirect, Mr. O'Brien?

Redirect Examination by Mr. O'Brien.

Q. Mr. Teece, on cross examination you stated that whenever there is a single violation, the matter is turned over to your attorneys for prosecution.

Now, I would like you to reconsider that answer and ask you if the Seagram Company calls upon named or suspected violators before prosecuting them?

A. Constantly.

Q. Then will you describe the policy, a violation, and then what happens, then what do you tell the attorneys?

A. When we hear of a violation, we go in to the person who has violated. We instruct our men to go in and talk to him and tell him we understand he is violating. We want him to quit it, and if he doesn't, we are going to take out an injunction against him.

In a great many cases, we have compliance. Some we don't, and then we take out the injunction against him.

60 Q. In short, if there is a violation, you warn him?

A. That is right. The fact of the matter is we also at intervals send out notices to the trade as a whole of our fair trade prices. We have done that whenever we have a change in bottle prices, or put on a different size, or anything, we circularize the trade to that so that they are constantly aware of what our fair trade prices are.

Q. When you say you circularize the trade, what do you mean?

A. We mean that at different intervals, we will send out to every licensee a price list of Seagram's products. We have a matter of record on that.

Q. Every licensee—

A. In Cook County. The fact of the matter is, every licensee in the State of Illinois.

Mr. O'Brien: Thank you.

The Court: Anything further?

Mr. Biro: Nothing further.

The Court: You may step down, Mr. Teece.

(Witness excused.)

Mr. O'Brien: That is all, your Honor. Plaintiff rests.

Thereupon the Plaintiff rested its case.

61 Mr. Biro: May I have just a moment, your Honor?

If the Court please, at this time the defendants in this matter move this Court to dismiss the complaint on the basis that the plaintiff in this matter has failed to establish either Federal jurisdiction to prove to this Court that there is a $3,000 minimum involved, or to prove that there is equity jurisdiction, which would be necessary in this particular matter.

The Court: No equity jurisdiction?

Mr. Biro: That is right, your Honor.

The Court: All right.

Mr. Biro: It would seem to me, to say the least, it would be—

The Court: Then I was awfully wrong in entering a preliminary injunction here if there is no equity jurisdiction here because that is one of the most severe remedies there is in the law, or in the field of equity jurisdiction, isn't that right?

The Supreme Court has said I was right by remaining silent at least, and the Court of Appeals approved what we did here.

Mr. Biro: With due deference to your Honor, may I say it seems to me in my limited knowledge—

62 The Court: When you say "your Honor," do you include me in that great company?

Mr. Biro: I do, your Honor.

The Court: Thank you very much.

Mr. Biro: It seems to me in order to have equity jurisdiction, as I understand it, we fall in the category of irreparable damage. I am not too good a semanticist, but it seems to me—

The Court: You do all right. Even if you use that word, that means you are an expert in semantics.

Mr. Biro: I think I had better quit while I am ahead.

The meaning of the word "irreparable" would seem to me as being something that is not capable of being ascertained.

The Court: "Irreparable" means not capable of being ascertained?

Mr. Biro: Yes. I mean as it is used. He cannot state what damage is going to happen to us, but it is going to be "irreparable" to us. I am not using it in the broadest

sense here. I am using it in the sense that it is used in this particular instance.

The Court: What you mean to say, I think, is that irreparable damage cannot be ascertained.

Mr. Biro: Yes, that is right.

63 The Court: You don't define irreparable damage.

Mr. Biro: No, I mean in the sense that it was used by the people in this matter.

Now, if the Court please, in order to ascertain what damage is done or has been caused here, the plaintiff has relied upon the fact that we spend a lot of money; we have a trade mark, and we are going to lose, as the result of such expenses that we cannot ascertain what we are going to lose.

Your Honor, if I may refresh your recollection a little bit on the basis of the decisions which we have argued before the Court, we feel the question of the necessity of having a minimum of $3,000 as the Court's basis, we feel it was not proven in this matter.

We further feel that to say that we had a trade mark is not at all applicable in this particular instance because of the fact that the plaintiff in this particular cause of action does not produce the product in question. It buys the product, if you will, from its parent organization, and takes this product and then sells it to wholesalers, and the wholesalers in turn sell it to retail licensees.

The Court: What does the Court of Appeals say

64 about that?

Do you mind, Mr. Biro, my interrupting?

Mr. Biro: Not at all.

Mr. Kohn: They say in point one of their opinion:

"The findings of fact by the district court are sufficient to embrace all the material allegations of the amended complaint."

Supported by the evidence, which is in the record today, including what was testified to today, they include findings of Federal jurisdiction, probability of irreparable damage to the plaintiff, and non-abandonment by the plaintiff of its price-fixing contracts.

The very same cases were argued before your Honor and before the Court of Appeals.

The Court: That is my impression. I took a stand, and the Court of Appeals approved of my stand, and the United States Supreme Court refused to take the case.

Mr. Biro: That is right, your Honor.

The Court: How can we now begin to argue the jurisdictional question?

If we didn't have jurisdiction in my preliminary
65 injunction, it would have been invalid and improperly entered.

Mr. Biro: That is correct, and that is why I am saying it. I am talking very frankly. If I didn't disagree with your Honor, I would not be making these points to the Court.

But I feel, with due deference to the Court, that there is a moral and professional responsibility to the client to pursue those points which I feel are valid points, and that is what I am doing, for the record.

The Court: You may make any point you see fit in support of your motion. I agree with you that you should make them.

Mr. Biro: Your Honor has indicated there is no sense of my taking the time of the Court. I have told you what I am basing my motion on.

The Court: I don't certainly see how I can run out on my previous findings made before, especially when those points were covered in the review of the case by two courts. I don't see how I can do that.

Mr. Kohn: In addition, the same ruling has been made by all of your colleagues—not all of them, but four or five in the district court here. You have been in several
66 of those cases yourself, and you never saw fit to appeal from them, I mean your firm.

Mr. Biro: My motion is denied then, your Honor?

The Court: After you finish your argument, I will rule. Don't take the words out of my mouth.

Mr. Biro: I have finished my argument.

The Court: Your motion is to dismiss the complaint? Is that your motion?

Mr. Biro: That is my motion.

The Court: What you really mean is to dismiss the amended complaint. If that is your motion, and the amendment to the complaint—

Mr. Biro: To the complaint.

The Court: If that is your motion, I deny it.

Anything else?

Mr. Biro: Yes.

Did you introduce the stipulation?

Mr. O'Brien: Yes, the stipulation is filed.

Mr. Biro: If the Court please, one of the points in the

stipulation is that the record in the Seventh Circuit shall be a part of the record here.

The Court: Since that is a part of the stipulation, I suppose it should be introduced as somebody's exhibit. We have done it both ways. We have filed it here or
67 we have had one party or the other introduce the record. I am not so disturbed at the size of that record. We have had some pretty thick ones.

It is in the stipulation.

Mr. Biro: May we introduce it as Plaintiff's and Defendant's Exhibit 1, jointly, if there is such an animal? It doesn't matter to me.

The Court: I have never heard of an exhibit being both plaintiff's and defendant's.

Mr. Kohn: Why don't we just agree that this printed record be filed as a part of the record in this case?

The Court: I have done it that way most often. Let the record show that counsel is filing the transcript of record filed in the United States Court of Appeals for the Seventh Circuit upon the defendant's appeal from the preliminary injunction entered heretofore in this case, and it will be considered a part of the record.

That is your stipulation?

Mr. Kohn: That is right.

And the case number in the Court of Appeals is—

The Court: 11,275.

Mr. Biro: Thank you, sir.

68 The Court: Anything else?

Mr. Biro: I want to give Mr. O'Brien an opportunity to take a look here. I put it on the side of the table. I thought he took it when I took his exhibit.

May I ask leave to have this marked as Defendant's Exhibit 1 for identification, please?

The Court: Let it be so marked.

(Said document was marked Defendant's Exhibit 1 for identification.)

Mr. Biro: If the Court please, Defendant's Exhibit 1 for identification was not broken down as the plaintiff did with theirs, other than it includes the shoppings.

The Court: Before you talk about it, do you offer it?

Mr. Biro: I do, your Honor.

The Court: Any objection to it?

Mr. Kohn: We have not seen the first page, is that right, Mr. O'Brien?

Mr. O'Brien: That is right.

If we may have a few minutes?

The Court: We will take a brief recess.

(Recess taken.)

The Court: We were considering this offered ex-
69 hibit of yours, Mr. Biro.

Mr. Biro: If the Court please, I would like leave to offer Defendant's Exhibit 1.

The Court: You don't have to have leave to offer it. You do offer it?

Mr. Biro: I do offer it.

The Court: Any objection?

Mr. O'Brien: No objection, your Honor.

The Court: Let Defendant's Exhibit 1 for identification be received into evidence as Defendant's Exhibit 1 with no objection on the part of the plaintiff.

(Whereupon said document, so offered and received in evidence, was marked DEFENDANT'S EXHIBIT 1.)

Mr. O'Brien: We have no objection to this paper coming into evidence, your Honor. Of course, we will present comments on the weight of the figures.

The Court: I don't even know what is in it. I take it, with no objection. You may comment to any extent later, Mr. O'Brien.

Mr. Biro: If the Court please, the summary of the shoppings of the defendant, made by the defendant, is attached to the top of this exhibit, and it shows that it is actually a breakdown of the composite figures
70 combined in Defendant's Exhibits 1 and 2, on pages 47 through 54 of the transcript of record which is a part of this record now, together with the additional figures of the additional shoppings, and these sheets are the reflections of the additional shoppings, all of which were supported by affidavits, and this was done by stipulation with the attorneys and this was done by stipulation in order to bring a whole slew of people in here to take up time.

We, if the Court please, broke down these shoppings so that there was a total of 378—7 Crown bottle shoppings and of the 378—7 Crown shoppings there was a total of 201 violations found, or 53.1 per cent, of the people who were shopped for 7 Crown were found to be violators.

We further broke down our shoppings into VO shoppings which is one of the other products of the plaintiff in this suit. In that particular instance, there were 237

shoppings, of which 85 violations were found on the bottle level, making a total percentage of violators of 25.1.

The total number of bottle shoppings of Seagram products as such, represented 705 shoppings with 286 violations to be found at the bottle level, or 40.5 per cent
71 of violations.

We also, if the Court please, shopped—

The Court: Let me interrupt and ask you this question: What do you perceive to be the legal significance of that, assuming that it is accurate? And assuming that your shopping people did a good job? Does that mean that merely because there were a substantial number of violators that your client, if they did violate, are not to be charged with some responsibility?

Mr. Biro: What I say then, your Honor, or what we say, if I may, is that these figures can give rise to only one conclusion and that is that the plaintiff in this action have abandoned whatever fair trade program they may have had.

Nobody, if the Court please, can allege that they have a fair trade program when shoppers can be sent out, and in 40 per cent of the cases in 1953, if you will, of a given product, which is their leading product, are able to find a Seagram product at less than the alleged fair trade price.

And if the Court please, if you look at the figures for the case goods, and that was the reason for the big buildup on the case goods, you will find in 7 Crown
72 99.7 per cent of the cases shopped were violations, and in VO it was 96 per cent, or a total of 97.1 per cent.

In other words, to say for these people to do it is perfectly all right, but you 53, you are not going to do this for we are not only going to enjoin you, but we will bring you in for contempt of court.

The Court: Are you arguing your case now?

Mr. Biro: You asked me what I was intending to prove.

The Court: I have got your answer.

Mr. Biro: All right.

The Court: I perhaps should not have asked the question. Your summary or whatever you call it is in evidence for what it is worth.

Mr. Biro: That is correct.

The Court: We will hear you fully afterwards, when you close your case. I mean when both sides have rested.

Thereupon the defendant, to maintain the issues in its behalf, introduced the following evidence, to-wit:

73 F. J. McDONALD, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Biros

Q. What is your name, please?
A. F. J. McDonald.
Q. Where do you live?
A. 7504 Colfax Avenue.
Q. Is that Chicago?
A. Yes, sir.
Q. What is your occupation, Mr. McDonald?
A. Private Detective.
Q. With whom are you associated?
A. I am the owner of Maguire & White Investigations.
The Court: There is no Mr. Maguire or no Mr. White, is there?
The Witness: No, sir.
The Court: There has not been for years.
The Witness: Not since 1942.

By Mr. Biro:

Q. How long has Maguire & White been in the in-
74 vestigation business, Mr. McDonald?
A. Since 1894.
Q. How long have you been with them, sir?
A. I have had the office since 1951.
Q. How long have you been in the investigation field yourself, Mr. McDonald?
A. About 25 years.
Mr. McDonald, you made some shoppings at the request of Foremost Promotions, is that correct, sir?
A. Yes, sir.
Q. I ask you, Mr. McDonald, whether or not you shopped Jacobson's Twin Liquor Shop at 1944 East 74th Street?
A. I did.
Mr. O'Brien: What was that address?
Mr. Biro: 1944 East 74th Street.

By Mr. Biro:

Q. Mr. McDonald, did you check Jacobson's Twin Liquor Stop as to their willingness to deliver?

A. I did.
Q. What did they tell you?
A. They said they would.
Q. Where did they tell you they would deliver?
A. They told me they would deliver any place in
75 Cook County.
Q. Any place in Cook County?
A. Yes, sir.
Q. Now, Mr. McDonald, you bought—and I am not leading the witness here, Your Honor; this is a part of the stipulation in here.
You bought Seagram's 7 Crown, a case of Seagram's 7 Crown at Jacobson's Twin Liquor Shop at $45.90, is that right?
A. That is right.
Q. Calling your attention, Mr. McDonald, to Zimmerman's Cut Rate Liquors at 140 N. Wells, you bought a case of Seagram's 7 Crown there at $45.27?
A. That is right.
Q. Did you ask Zimmerman's Cut Rate Liquor as to their willingness to deliver, sir?
A. I did.
Q. What did they tell you?
A. They told me they would deliver any place in Cook County, and in some cases, almost to the State line.
Q. Mr. McDonald, calling your attention to Goldblatt's Department Store at 333 South State Street, you bought a case of Seagram's 7 Crown there below the stipulated fair trade price. Did you ask whether or
76 not they would be willing to deliver?
A. I did.
Q. What did they tell you?
A. They told me they would deliver any place in Cook County.
Q. Calling your attention to Solomon's Drug Store at 121 to 127 North State State, you bought a case of Seagram's 7 Crown, for $45.50. Did you ask the same question?
A. I did.
Q. What did they tell you?
A. They told me they would deliver any place in Cook County.
Q. Did they also mention Lake County there?
A. Some parts of Lake County, yes.

The Court: What is the fair trade price per case of Seagram's 7 Crown?

Mr. Biro: $51.65.

The Court: $51.65?

Mr. Biro: Yes, sir, and the price I am quoting is with the 3 per cent Occupational Tax which had already been added.

That is all.

The Court: Any cross examination?

77 Mr. O'Brien: I would like to ask one question.

Cross-Examination by Mr. O'Brien.

Q. Mr. McDonald, I think it is probably already clear —Mr. McDonald, did you pick the stores to be shopped or were you told where to shop?

A. I was told where to shop.

Q. Mr. McDonald, you did, or your organization did quite a bit of shopping in December, 1954, and January and February and March, just a few months, in 1955 for these defendants, isn't that correct?

A. To the best of my knowledge, yes.

Q. Did you pick the stores to be shopped in that course of shopping, or were you told where to shop?

A. On some occasions, I chose the stores that were to be shopped, and on other occasions, I was given a list to shop. As to the accuracy of the two shoppings, or the times, I would be unable to tell you that.

Q. Would you say that in most of the stores shopped you were under directions to shop that specific store?

A. Yes, that is about right.

Q. That is with written lists?

78 A. Yes, sir.

Q. Provided you by Mr. Irving Robbins, is that correct?

A. That is right.

The Court: Who is he?

The Witness: He is the president of the Foremost Liquor—

Mr. Biro: Foremost Promotions.

The Court: I knew that, but I wanted to get it into the record.

By Mr. O'Brien:

Q. This Defendant's Exhibit, Mr. McDonald, has a list here of 263 shoppings performed by yourself. It is Defendant's Exhibit 1, I guess, for identification at this time.

The Court: It has been received into evidence.

Mr. O'Brien: It is Defendant's Exhibit 1.

By Mr. O'Brien:

Q. How do you explain, Mr. McDonald, if I told you that of the 263 reported shoppings, there were 34 repeat shoppings; in short, that there were not 263 stores shopped that there were only 229 stores shopped, is
79 there any reason why certain stores were revisited?

A. At the request of my client for that particular job. That is what I would say, to the best of my knowledge.

Q. Mr. McDonald, your organization did the shopping in May of 1954 for the man who is the attorney in fact and agent for all of these defendants, is that correct?

A. I am not so certain of the date. I cannot say that I know that.

Q. Well, as a matter of fact, it is in the record that you did.

A. Well, there is a possibility I did. I am not going to —because I have no records here. I haven't referred to my records recently and I don't know just the time these shoppings were made. I would be unable to tell you that.

Q. If I told you, Mr. McDonald, that in May you shopped a liquor store at 5736 West Madison twice, finding violations, and that same store was shopped twice more in the period December, 1954 to January and February, 1955, would that agree with your recollection of the nature of these shoppings?

A. About that time, yes, I believe so.

80 Q. You do revisit these stores?

A. Yes, occasionally that is done, a re-shopping is made.

Q. Would you re-shop the same store on the same day; if so, why?

A. Not to my knowledge. I don't believe that has ever been done. I don't believe it was ever done. No, I know it has never been done.

Q. I will direct your attention to Defendant's Exhibit

1 for identification, Shopping No. 186, at Williams' Liquor Store, 5736 West Madison Street, was shopped twice, on December 6, 1954.

Mr. Biro: Your Honor, I fail to see where it becomes pertinent a fact here. The question is, it would seem to me, did that licensee sell at less than the alleged fair trade price?

Mr. O'Brien: He did both times, your Honor.

The Court: Evidently Mr. O'Brien thinks the fact that they shopped the same retailer twice has some significance, which I anticipate he will tell me about later.

I will let the witness answer. If it has no signifi-
81 cance, you need not be disturbed by it.

Mr. Biro: Oh, I am not disturbed by it, your Honor. As a matter of fact, for the record it is a matter of fact, and I think in fairness, Mr. O'Brien and I discussed this matter.

Mr. O'Brien: This is no surprise to Mr. Biro.

Mr. Biro: It is no surprise and we agreed to stipulate in fact, I believe, there were 36 or 37, if I am not mistaken, instances where the same place was shown to be shopped twice.

The Court: You may proceed with your cross examination, Mr. O'Brien.

If you made an objection, and I don't think you did, I will overrule it and let the witness answer.

By Mr. O'Brien:

Q. Your answer then, Mr. McDonald, is that this comes to you as a surprise?

A. It is a surprise to know that they shopped—that the two were shopped on the same day, that is by my office.

82 Q. Mr. McDonald, how many employees does Maguire & White have on a permanent basis?

A. All of our employees are on the basis of if we have work for them, we call them, and we have about 8 or 10 different men that we call upon at times for work. We do not have what we call regular employees.

Q. In short, all of your employees are part time help, is that correct?

A. They are. They work on the basis that when we have work for them, they go out and do it.

Mr. O'Brien: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Anything further?
Mr. Biro: The defense rests.
Thereupon the defendant rested its case.
The Court: Any rebuttal?
Mr. O'Brien: Yes, we would like to call Mr. Teece as a rebuttal witness.
Thereupon the plaintiff, to further maintain the issues in its behalf, introduced the following evidence, in rebuttal, to-wit:

83 WILLIAM R. TEECE, called as a witness on behalf of the Plaintiff, in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien.

Q. You are the same Mr. Teece who was here a few minutes ago?
A. Yes, sir.
Q. Mr. Teece, have you in the near past received apparently authentic reports of violations with respect to Seagram's fair trade case prices?
A. I have.
Q. When was this, Mr. Teece, and from whom did you receive such a report?
A. I received this report from the Merit Service the first part of last week; about the middle of the week when I got hold of it.
Q. What happened?
I immediately put shoppers out and had an opportunity no less than Saturday to shop 10 accounts, and I found nine violators out of ten calls.

Q. Mr. Teece, what do you propose to do about
84 these nine violators?

A. It so happens that we have permanent injunctions against five of these, and we are going to ask for contempt on them, and we are going to ask for an injunction against the other four.
Q. Would you read the names off, Mr. Teece, of those stores against which action is to be taken now?
A. I hate to quote some of these prices because I wish I could buy it myself at these prices.
Gentlemen's, 1401 North Wells Street, a case of 7 Crown, $45.17.

Quality Liquor House, 104 South Clark, one case at $44.90.

Goldblatt's, at 333 South State Street, one case at $46.

Solomon's, 1121 North State Street, one case of 7 Crown, $45.50.

Thrifty Liquors, 5556 West Broadway, one case, $42.50.

The Personal Liquor Company, 4241 West Madison Street, one case at $46.

Shipps Liquor Company, 5511 South Damen, one case at $42.85.

L & M Liquor, 8001 South Ashland, one case
85 at $44.27.

Twin Liquors at 1942 East 71st Street, one case at $44.80.

Q. What did you say you were going to do with this list?

A. I am turning the list over to you, as our attorney, right at the present time with full instructions to prosecute.

(Questions by the Court and answers thereto, stricken from the record by order of Court:)

Mr. Kohn: If the Court please, I think we are getting off the track.

The Court: Yes, I know, but I—

Mr. Kohn: About economic matters that have no bearing on retail price matters.

The Court: That may be, but certain names were mentioned here who are alleged violators and I am just wondering what the plaintiff does to those people, when their violation is brought to your attention.

You take appropriate action, do you?

The Witness: I would do that to my own brother.
86 I think Mr. Biro will bear us out on that.

Mr. Kohn: For the Court's information, I believe that one of the early hearings, at that hearing, you mentioned Macey's. I think they have ceased their fight against fair trade through an injunction; so I have been told. It is a matter of education.

Mr. Biro: Is that a part of this record?

Mr. Kohn: It is not worth much. It is only my statement.

The Court: Anything else of this witness?

Mr. O'Brien: No.

The Court: Any cross examination?

Mr. Biro: If I may, please.

Cross-Examination by Mr. Biro.

Q. Mr. Teece, you listed—

A. If you want a list of these, I will give it to you.

Q. No, I have a list. As a matter of fact, the list happens to correspond with the list that you have.

May I ask—

A. I didn't know from you. I didn't get this information from any of your people.

87 Q. May I ask when Merit shopped Zimmerman's, Quality, Goldblatt's, Solomon's, and some others, how did they happen to select this given group of stores?

A. They were not given any names whatsoever to go out. I think the Merit people who did the shopping for us gave instructions, and I don't know whether they gave instructions to shop any of the large ones or not but I told them to shop the Loop territory as much as they possibly could over this Saturday, and this is what they got.

There are some outlying stores that are known violators.

Q. In other words, just by coincidence—

Mr. O'Brien: To clarify the record, I was familiar with this letter and made it known to the responsible parties.

Mr. Biro: That is what I was getting at.

By Mr. Biro:

Q. May I ask another question along the line of what the Judge asked you, if I may?

You said that you could not stop known violators from getting your product. Now, isn't it true that any of your wholesalers can refuse to sell to any retail licensee on

88 the basis that he violates the law?

Mr. Kohn: If the Court please, this calls for a legal conclusion. I didn't want to object when the Court was being enlightened; but I think it is immaterial.

The Court: Very often the Court may ask immaterial questions to become educated.

Mr. Kohn: I move at this time that the question be stricken.

Mr. Biro: I will withdraw the question.

That is all.

Mr. Kohn: It does call for a very difficult legal conclusion.

The Court: Counsel has withdrawn the question.

Mr. Kohn: I would like also to move to strike it from the record.

The Court: My inquiry?

Mr. Kohn: Yes.

The Court: I will do that. I will agree with you it was not material, but it is a part of my education. When we are trying a case without a jury, I try to find out how some of these businesses function.

89 You are quite right, Mr. Kohn, under these pleadings, my questions were not germane.

Anything further of this witness?

Mr. O'Brien: Nothing of this witness, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. O'Brien: At this time the plaintiff would like to offer—or first have marked as Plaintiff's Exhibit 6 a document entitled—that is Plaintiff's Exhibit 6 for identification, a summary of the Maguire-White shopping list.

That is plaintiff's summary of Defendant's Exhibit 1.

(Said document marked Plaintiff's Exhibit 6 for identification.)

Mr. O'Brien: And at this time, your Honor, pursuant to counsel for the defendant's agreement, we will offer Plaintiff's Exhibit 6 for identification into evidence as Plaintiff's Exhibit 6.

The Court: Let it be received as Plaintiff's Ex-
90 hibit 6 with no objection on the part of the defendant.

Mr. Biro: That is correct, your Honor.

(Said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 6.)

Mr. O'Brien: The plaintiff has nothing further.

The plaintiff rests in rebuttal.

Thereupon the plaintiff rested its case in rebuttal.

The Court: I will hear you, Mr. O'Brien, and/or Mr. Kohn.

Mr. Kohn: Mr. O'Brien will make the opening statement.

Mr. O'Brien: Your Honor, at this time I simply address myself to the only factual question before the Court. The legal questions, we believe, are not worthy of comment, at least at this time.

The factual question before the Court is whether or not the plaintiff has been fair, reasonable, and diligent in its

enforcement efforts. There is no dispute as to the nature of what you must do to have and preserve your fair
91 trade program. There is, of course, a dispute here as to whether or not we have done that.

I would like to comment first, and this bears on some of the questions by your Honor to Mr. Teece—

The Court: They are out of the record.

Mr. O'Brien: Then my remark will be omitted.

The Court: If the reporter has not yet done so, I instruct him now to strike my questions and the answers thereto.

Mr. O'Brien: I would first like to comment on the fair trade enforcement cases, contempt, brought by the plaintiff since April 30, 1954, a total of 15.

The Court: Those are included in the exhibits, are they not?

Mr. O'Brien: Yes, sir.

What I am about to say is also a matter of record. It is a matter of record in this court house.

The Court: You mean before other Judges?

Mr. O'Brien: Yes, sir.

I would like to direct your Honor's attention particularly to item No. 4 of Plaintiff's Exhibit 4—excuse me, Item No. 6, and Item No. 9. The question arises
92 what to do with the persistent violators.

I think Items Nos. 6 and 9 show the attitude of the plaintiff towards those people.

He was brought in once and found guilty of contempt and fined $25. Two months later, he was again reshopped, obviously, and brought before Judge Knoch in that instance, and this time the fine was $118.20.

I might also say, your Honor, and it is a matter of record in this court house which the Court can take judicial notice of, that for failure to pay this fine of $118.20 the president of Cale's Liquor Mart was subject to a writ of attachment.

The Marshal went out for Mr. Frank Cale, president of Cale's Liquor Mart. These are the lengths to which the plaintiff will go. In short, any available legal remedy is utilized and has been utilized daily before the various Judges of this District Court.

Now, I would like to comment for a moment upon the various shoppings that have come before your Honor. We had made a survey by Merit Investigative—or Merit Protective Agency, an overall survey, as Mrs. Wassmundt,

the president, said, based on representative stores
93 all the way across the City of Chicago, throughout the whole entire area, based on their experience in this field.

We did not tell them who to shop except in a case of reshopping violators. They went out on their own, based on their own records and their experiences in shopping and they shopped just for bottle prices.

After all, as Mr. Teece said, 95 per cent of our business comes from the sale at retail of bottled whiskey, not cases of whiskey, although we are just as firm about the fair trade price, but to get a fair overall picture of the Seagram price picture, the emphasis was on the bottle prices, and that figure came out 85 per cent.

Now, the defendants have come up with a hodge-podge of reports of shoppings. Some were made in May of 1954. Some were made in December of 1954, January and February and March of 1955. Some were made just last week.

Mr. McDonald said he was told where to shop. He further said, in marked contrast to the Merit Agency, when he had the shopping to do, he goes out and hires somebody to do the shopping.

94 The matter of repeat shopping, one wonders why the same store is shopped twice on the same day in one instance and Ed Williams' Liquor Mart was a favorite. He shopped, according to the various exhibits offered by the defendant, Ed Williams was shopped four times.

The Court: Your comment, please, Mr. O'Brien, on counsel's assertion that the Defendant's Exhibit 1 in his opinion constitutes an abandonment of the plaintiff's fair trade policy.

Mr. O'Brien: My comment is directed towards that.

The Court: What do you say about that—merely because numerically they are superior to the plaintiff's exhibits, what do you say as to that?

Mr. O'Brien: Your Honor, I say this: First of all, this numerically is not impressive because it is an accumulation of these shoppings ordered by Mr. Robins from time to time on orders he gave to Mr. McDonald.

I reject their figures—I reject this whole thing as constituting the results of shoppings made, but we do not think it is worth the paper it is written on. It is in evidence, sure, but the Merit survey, the market survey—

The Court: What are your reasons for saying that
95 the exhibit is entitled to no weight?

Mr. O'Brien: Your Honor—

The Court: I know one of them is that they are selected retailers.

Mr. O'Brien: Selected retailers?

The Court: Yes.

Mr. O'Brien: And selected by the agent and attorney in fact for the defendant in this case.

The shoppings in December, January, February and March—December, 1954, and January, February, and March, 1955, were selected by the agent and attorney in fact for the defendant while this very case was pending, including, of course, the issue of abandonment.

Our shopping was also conducted while this case was pending, but we did not select the persons to be shopped.

Our thinking was this: Our program, as described by Mr. Teece, has been going on from week to week by men on the street, sending out shoppers as a regular program.

Now, as this case came on for trial the question came up; let us find out what our market situation is. Shall we hire some people that we were led to believe were
96 experts? We called them in, as Mrs. Wassmundt said, and we said, "Here it is. We want you folks to go out and tell us what the Seagram market picture is."

They shopped 284 different stores in a period of three weeks.

The Court: I observe this rather strange thing. In Defendant's Exhibit 1 a prominent drug chain is shopped on the same day, among three of its stores, if not in the same neighborhood, in the same community, and that retailer, which is one of the great commercial chains of the country, on the same day is reported to have sold a case of the same brand in one place at $43.00, and in another place at $48.50, and still another at $50.00.

That seems rather strange to me.

Mr. O'Brien: Your Honor, I think the answer to that is this, that you have individual store managers in these chains and they have one set of problems. Their own personal problem is making sales, and they have to be watched. In other words, the manager of a small retail outlet of a chain wants to show his bosses that he is moving this stuff out.

The Court: Do you happen to know that a manager of one of the branch stores can make his own prices
97 on a case of whiskey? I don't know that this is material here, but it seems to me, from what I know

about business, that prices in a great big corporation for the same article, even if they set out to violate the fair trade law, would be the same on the same day in the same community for some store manager is not being fair with his employer.

Mr. O'Brien: Your Honor, I think that is a very reasonable possibility. I think another possibility, of course, is the nature of the shopping, and I think the nature of the shopping may be tainted by the directions given to the shopper.

"Go shop such-and-such a store. You shop. Here is a case pending." Mr. Robins is the agent and attorney in fact of these defendants, and he has gone on record and sworn to a complaint that Seagram has abandoned fair trade, then he calls in a shopper and says "You go shop Store X and Store Y and Store Z."

Based upon what is in the record, your Honor, the whole thing smacks of an atmosphere not calculated to produce an accurate market picture.

I would like also to point out this, your Honor: Plaintiff's Exhibit 6, which has been received—this is our
98 summary of the bulk of Defendant's Exhibit 1, that is the 263 shoppings made in December, 1954 and January, February and March of 1955, while this case was pending. The total number of reported shoppings was 263. Yet analysis reveals that only 229 individual stores were shopped.

They shopped case prices in 122 stores, or rather there were 122 shoppings which is not broken down by stores and yet in 141 of stores shopped for bottle prices, they didn't bother to ask about case prices. Why?

In 122 stores they shopped—

The Court: Is your answer to your question that they were fearful they might find some in compliance?

Mr. O'Brien: Your Honor, I think that is a distinct possibility. I think that this is the type of thing that one finds in this document, puts a mantle of suspicion about the whole thing.

If we are going to do a survey, if in 122 stores they shopped bottles and cases, why not be consistent throughout? It seems to me that data of this sort, if not consistent is worthless.

In any event, let us just look at the bottle prices because they did check bottle prices in every one of these 229
99 stores and in the 263 shoppings. The bottle prices

show that there were 152 shoppings of bottle prices of either VO or 7 Crown below the fair trade prices.

The defendant's own suspect figures show 371 shoppings of bottle prices at the fair trade price level. So, taking the defendant's own suspicious figures, we come up with a percentage of compliance in a survey made while this case was pending, and a survey made in stores selected by these defendants, with a figure with respect to bottle prices, which constitute approximately 95 per cent of retail sales of the defendant's product, we come up with a percentage of compliance of 70 per cent.

So, in short, your Honor, we have a record here that is manifest and shows a picture of a company doing everything within its means, taking every possible legal recourse against violators of their fair trade program.

Granted there are always going to be violations as your Honor pointed out in one of the many colloquies last July, and Seagram admits that. You saw the situation today when there was, in this very court room, portrayed for your Honor a demonstration of the Seagram policy, some form of currently bona fide report of violations.

In the instance a few minutes ago it was the stores that I heard about from Mr. Biro. They were immediately shopped. Mr. Teece had the list, and they were shopped over this weekend, and Mr. Teece gave me my instructions to file either contempt—it makes no difference, either a new suit or contempt, we don't care who it is, Goldblatt's, Solomon's, or anybody.

It is going to be a continuing problem. I will be over here plaguing your Honor and other Judges for perhaps a long time to come in these suits but I will be here, and my instructions will be the same, and everyone will get the same treatment.

Your Honor, we think the record conclusively demonstrates fair, reasonable, diligent and effective enforcement of the plaintiff's fair trade program.

The Court: Mr. Biro, I will hear you.

Mr. Biro: Your Honor, I am at a little bit of a loss to understand the stigma, if you will, of selecting specific retailers to be shopped. I am suffering under the apprehension, perhaps misapprehension, that if there is a fair trade program, it is a fair trade program that applies to one and to all.

As Mr. O'Brien knows, the thing that brought rise to this suit in the first instance is a photostat, if you will,

of a newspaper advertisement. That is, the part of the transcript of record came about, your Honor, because of the fact that our basic pleadings at the beginning was that you cannot say that part of us are fish and part of us are fowl. You either have a fair trade program, or you don't.

The Court: There is no evidence here, and if there is you point it out to me, that the plaintiff winked at violators. Conversely, the undisputed proof is that, principally through the vice-president in charge of sales, that they were extremely diligent not only in ferreting out violators but when discovered they did everything they could do, that is to say, placed the matter with their lawyers for appropriate action.

There is no evidence here, at least that I recall, and certainly none today and I recall none at the hearings on the preliminary injunction, that even tends to show that this plaintiff, to use a colloquial expression, was in cahoots with any particular wholesaler or retailer to let them sell at a lower price.

102 It is true, and I think we all know it, those of us who have any knowledge of this kind of situation, that there will always be price cutting. That goes in this industry as well as any other and it seems to me that all the law requires them to do is to be as diligent as they can.

Mr. Biro: Are they?

I mean, that is our question, if the Court please.

The Court: I think I must assume that from the testimony of an officer of the company who says that at the moment they find it out, that they find out there is a violation, they place the matter with their lawyers, and sometimes, as is indicated in one of these exhibits, a man, Cale, was it, was guilty of two acts of contempt.

You will always, find men who do that, either because they don't believe in the philosophy of the fair trade law or business is bad, and that is the only way they can move products, or for any other reason that might be present, but the fact that there are continued violations and perhaps always will be, does not take out of the record the proof that this distiller or this manufacturer was diligent.

103 Mr. Biro: Your Honor, if I may, for just a moment, whether the Court is willing to take judicial notice of the fact or not, the fact remains there are cer-

tain people who are chronic violators. There are people who were notorious in the field, and that is probably true in any line of endeavor you care to get into that will constantly flaunt the law and the authority of the Court.

I cannot understand, nor can my clients, why it was necessary for us to get to Mr. O'Brien the names of ten, if you will, notorious people so that they have to go out and shop, if they are diligent? Is it necessary for us to tell them?

The Court: I will answer that. I could give this as the answer to your inquiry:

Here, there are several thousands out there. It is not possible to have detectives on the street all the time. After all, these people are not in the investigating business, they are in the whiskey business.

Mr. Biro: But they want the protection of the law that is given to them.

The Court: They have done industrious and diligent jobs. I suppose those who violate the Federal Trade
104 *Statute would say that they* would have to have a permanent staff of investigators to go day by day and day after day to these retailers and shop them. I wonder whether the law requires that. I doubt it.

Mr. Biro: Your Honor, it would seem to me if they want the benefit of the law to protect their position they must, of necessity, take whatever detriments or burdens that is entailed.

Now, your Honor asked a pointed question as to the three stores—

The Court: You need not mention them. They are in evidence. They are Walgreen's stores.

Mr. Biro: Yes, your Honor.

The Court: Shopped on the same day and in the same community.

Mr. Biro: There is only one conclusion you can draw from that, your Honor. Whatever the traffic will bear is the current price, for Seagram products. I mean, that is the very point we are making.

The Court: I don't draw that conclusion.

Mr. Biro: Is the answer than that the manager is a rascal?

The Court: Please don't ask me to pass on that, but I know enough about the management of that company—

105 Mr. Biro: No, I am talking about the managers of the individual stores.

The Court: They would discipline any manager who sold as expensive an item, something that cost between $40 and $50 for a price not fixed by the company.

Now, you know enough about this business; you have got a lot of these cases. I think you will agree with me there is something strange about that, and I do not point a finger of suspicion at the man who made the alleged purchase. I would be interested in knowing how such a thing came about, if it did.

I mention it in passing as something of notice. I do not think it is determinative of any of the issues here.

Mr. Biro: You see, your Honor, when you asked Mr. O'Brien the question, Mr. O'Brien's answer to you was that the manager of there respective stores in question were interested in one thing. The thing he is interested in is his own sales record as it goes to the home office.

I also think that the important thing to point out is that this strong fair trade program, and I am quoting:

106 "Is predicated on the salesmen who only care about one thing and that is selling merchandise just in the same way, going out and talking to people to whom they sell merchandise, and then saying that because we told them this, they are going to buy, and they are going to sell at the price that we are telling them to."

Your Honor, a salesman is only interested in one thing, that is his own sales record. He is not going out there and tell that man, "Don't buy." He would be slitting his own throat.

The Court: Wouldn't it be plausible for a salesman to go into a retailer and say, "Here, here is the greatest whiskey item in the world," and I think Seagrams claims that it is; isn't that right, 7 Crown?

Mr. Biro: Seagram, among others, yes.

The Court: "We will protect you. We won't let anybody sell under this price. We will protect you so that you can make a legitimate profit." That is what a great company like Seagram—when I say that, I don't mean that I—

Mr. Biro: You are using quotation marks there.

107 The Court: I don't mean that I am in favor of the plaintiff in this case. We know it is a well known company.

Mr. Biro: We grant that.

The Court: "Deal with us and the resources of our company will be used to protect you so that you can sell

this product or these products at the price fixed and get a legitimate and fair profit out of the sales."

Oh, I think a salesman could well say that to a customer, and it would be a very appealing argument.

Mr. Biro: But obviously not adhered to by the figures of the number of violators.

The Court: I don't think it will ever be in the whiskey business or in the razor business or in the automobile business. We are having trouble in the automobile business today. All you have to do is turn on your television and you will find in one neighborhood a certain car costs so much, and you drive six blocks away or six miles away and you can get the same car at a much lower price.

Mr. Biro: One of the blessings of rugged individualism, your Honor.

108 The Court: I know some of the so-called independent manufacturers are having a lot of trouble.

Mr. Biro: May I ask a question?

The Court: I have asked a lot. I don't know why I should not let you ask one.

Mr. Biro: That is why I take this approach.

If you say that you do not feel that it is possible—you made the statement last July, I believe, that it is impossible for any manufacturer—in this instance they are not manufacturing—

The Court: If I said that, I want to qualify it by saying this: I think if they could get a couple of thousand of FBI agents or special agents to go to work for their company and just move from city to city, they probably could stamp it out, but I think just using reasonable diligence, and that is all they are obligated to do under the law, it would be a very difficult thing, and all they can do is their best, and work as hard as they can.

Mr. Biro: You feel there is no line of demarcation; in other words, assume that I took Mr. O'Brien's figures with ours broken down to 30 per cent instead of 40 per cent, that is percentage of violators, would it be enough to say that as long as 7½ per cent or let's say for the 109 sake of the discussion, 7 out of 10 are all right. Forget about the 3 that are in violation; we will hold the other 7 in line, it seems to me that you are reaching a position that at some place or other you must have a drop-off point.

The Court: I think all a trial judge can take is the evidence of a responsible officer of the company who says

the moment that they find out, they go to their lawyers and they have employed a great law firm who come into the courts and those who follow the work and participate in the work of this court know—I won't say there is scarcely a day, but certainly there is scarcely a week that goes by, and I read the Chicago Law Bulletin because I like to know what my calendar is for the next day, I like to see how many Seagram cases are assigned to me, and other cases, and in the new suits filed, we see with great frequency the Seagram suits filed in the Law Bulletin by this very law firm that is appearing in this case.

Mr. Biro: Your Honor, if we take the figure of the number of defendants, using your own argument, the number of defendants that Seagram has had before these various courts over the last year and a half—what was that figure?

110 Mr. O'Brien: 129.

Mr. Biro: —129, we make up 62 of that 129.

Mr. Kohn: Oh, no.

Mr. O'Brien: 53, I believe.

Mr. Biro: Well, I am using your number of defendants, your figure from your exhibits, Mr. O'Brien.

Mr. O'Brien: The figure we struck was the number of stores.

Mr. Biro: If I may, your Honor, from the time of the original hearing last July, if you will, up until now, they came into court, I think, a grand total of something like 25 times from July of 1954 until almost the beginning of December, 1955, the number of times that they are coming in to be on the ball, if you will.

Certainly that does not indicate diligence on their part or any other part, and with this philosophy of "every dog is entitled to two bites," we are going to let them go in. I mean, if I walk in, and I say to someone, "If you do this again I am going to haul you into court," he knows he is going to be shopped within a week or ten days unless he is a little bit sub-normal. If he has got any brains at all, he is going to leave well enough alone.

111 The Court: I think your arguments are directed more against the philosophy of this law rather than whether or not this plaintiff has been diligent in prosecuting violators.

Mr. Biro: For the record, your Honor—

The Court: If you want to go off the record with me on

the philosophy of the fair trade law, I might get over on your side.

Mr. Biro: I am not arguing philosophy, your Honor.

The Court: That is philosophy, and I have to follow the law.

Mr. Biro: I appreciate that, and for the record, your Honor, we happen to represent people on the other side of the fence where we are put in the position of coming in and getting injunctions to keep people from violating fair trade contracts, but I am not arguing philosophy, I am arguing the record here, and as to the number of violators there are, and say that we cannot see how these people can claim to put the mantle of protection of the so-called fair trade contracts over their shoulders when they are allowed to wink, if you will, at the fact that so many of them are violators.

We take the position—

The Court: I don't think it is evidence of "wink-
112 ing." I think it is evidence that there are some people they didn't catch.

The evidence is that as soon as information comes to them they see a lawyer. That is diligence, I think.

There will be a finding of the issues here in favor of the plaintiff and against the defendant.

If counsel for the plaintiff will file or present findings of fact and conclusions of law and a decree reflecting the views of the Court and the evidence in the case—a decree that will allow the plaintiff the relief prayed for in the amended complaint and the amendment to the amended complaint.

How long do you want to do that, Mr. O'Brien or Mr. Kohn? I do not necessarily want to fix the time.

Mr. Kohn: We will bring it in within the next few days and submit a copy to counsel.

The Court: I give these exhibits to Mr. O'Brien, and this is your copy.

Mr. Biro: Thank you.

113 Before Judge Hoffman,
December 5, 1955,
10:00 o'clock a.m.

Present:

Mr. Patrick W. O'Brien.
Mr. Louis L. Biro.

The Clerk: 54 C 832, Seagram Distillers Corporation vs. New Cut Rate Liquors, Inc.; Motion of plaintiff to enter findings of fact and conclusions of law, and a decree of permanent injunction.

Mr. O'Brien: We have one document, the findings of fact, and conclusions of law, and the other the decree of permanent injunction. Copies of them have been served upon the defendant.

The Court: Have you considered the objections raised by counsel to the form?

Mr. O'Brien: Yes, we have.

The Court: Are you satisfied that those meet the requirements of the rules?

Mr. O'Brien: Yes, we are.

114 The Court: In respect to form, Mr. O'Brien?

Mr. O'Brien: Yes, we are.

The Court: Do you have any comment?

Mr. Biro: For the record, your Honor, we still feel it violates Rule 65 (d), as we stated before.

The Court: Have you considered that objection?

Mr. O'Brien: Yes, we have, and we still feel the decision on the appeal on the preliminary injunction takes care of it so far as this hearing is concerned, whatever they do in the 5th District.

Mr. Biro: We, of course, feel that owing to the fact that Judge Schnackenberg saw fit to answer to the effect that this was not raised below, we feel the situation is different, your Honor.

Mr. O'Brien: And I hope that they will call the whole matter to Judge Schnackenberg's attention.

The Court: He may not be sitting on this case.

Mr. O'Brien: Or any one of his colleagues.

The Court: I will sign both the judgment and the findings of fact and conclusions of law.

Mr. O'Brien: Thank you, your Honor.

116 And afterwards, to wit, on the 5th day of December, 1955 being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman District Judge, appears the following entries, to wit:

117 UNITED STATES DISTRICT COURT.

* * (Caption—54-C-832) * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on for trial before the court without a jury, on plaintiff's motion for a permanent injunction, and the court having heard the evidence and considered the stipulation of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact.

1. All the defendants, except the defendant Foremost Promotions, Inc., an Illinois corporation, are engaged in the business of selling alcoholic beverages at retail at various locations in Chicago, Illinois. Foremost Promotions, Inc. is engaged in the business of promoting the 118 sale of alcoholic beverages sold at retail by the other defendants at their various stores and in preparing and causing to be published advertisements for the sale of such alcoholic beverages on behalf of said defendants, among which advertisements was the advertisement in the June 15, 1954 edition of the Chicago Sun Times complained of herein.

2. Plaintiff is and has been engaged in the State of Illinois for more than fifteen years in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Plaintiff is the sole person authorized by said producers to sell and distribute Seagram products in Illinois and sells the same to licensed distributers only. Said beverages, hereinafter referred to as Seagrams products, include Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's

Ancient Bottle Gin, are sold in various sized bottles bearing the trade-marks, brands and names of the producers thereof, and are and have been in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed in Illinois. It has in the past three years expended approximately $3,000,000 in advertising and promoting the sale of
119 Seagram products in Illinois and the trade-marks brands and names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois.

3. The matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

4. Plaintiff is a Delaware corporation. The corporate defendants are Illinois corporations and the individual defendants are all citizens and residents of the State of Illinois.

5. Plaintiff long prior to the defendants' acts complained of in the Complaint executed numerous Fair Trade contracts in Illinois in accordance with the Illinois Fair Trade Act, which contracts are now in full force and effect. Sales of Seagram products in Illinois have been subject to the provisions of such contracts which provide that said Seagram products shall not be sold, advertised or offered for sale within Illinois below the prices stipulated by plaintiff in written schedules. Prior to the acts complained of defendants received schedules of the prices stipulated pursuant to such contracts, which prices have been in full force and effect since April 15, 1953.

120 6. Defendants, notwithstanding the provisions of said Fair Trade contracts and the prices stipulated by plaintiff in accordance therewith, and notwithstanding plaintiff's insistance that said defendants comply therewith, did on or about June 15, 1954, wilfully and knowingly advertise and offer for sale Seagram products at prices below those stipulated therefor.

7. Unless enjoined defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby irreparably impairing the value of the trade-marks, brands and names under which Seagram products are sold.

8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to

comply with the aforesaid Fair Trade contracts, will substantially decrease the volume of sales of Seagram products in Illinois, and will irreparably impair the good will of the plaintiff and the good will of the trade-marks brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff.

121 9. None of the matters complained of involves sales made by any officer acting under the order of any court, or sales for the purpose of closing out said defendants' stocks of Seagram products, or sales of products damaged or deteriorated in quality.

10. The evidence does not support defendants' claim of abandonment by plaintiff of its Fair Trade program or defendants' claim that plaintiff has unreasonably failed and refused to take appropriate action against retailers alleged to have been selling Seagram products at prices below those stipulated by plaintiff in accordance with its Fair Trade contracts. Plaintiff is and has been vigorous, fair, diligent and effective in the enforcement and maintenance of its Fair Trade prices in the Chicago area by all appropriate methods, including many legal proceedings.

Conclusions of Law.

1. The Court has jurisdiction of all the parties and of the subject matter of this action.

2. The Illinois Fair Trade Act is constitutional and valid. Neither Federal nor Illinois law required its reenactment subsequent to the passage of the Miller-Tydings Amendment (15 U.S.C.A. §1) or the McGuire Act (15 U.S.C.A. §45).

122

3. Plaintiff's Fair Trade contracts entered into with numerous retailers in Illinois are valid and conform to the requirements of the Illinois Fair Trade Act and applicable federal law, and Seagram products are sold and distributed by plaintiff in Illinois in accordance with said Fair Trade contracts.

4. Defendants' conduct in wilfully and knowingly advertising and offering for sale Seagram products below the Fair Trade prices stipulated therefor is in violation of the Fair Trade contracts entered into by plaintiff and the Illinois Fair Trade Act.

5. Plaintiff is and has been reasonably, fairly, diligently and effectively enforcing its Fair Trade prices in Illinois

by all appropriate means, and has not abandoned or waived its Fair Trade program in Illinois.

6. Plaintiff has no adequate remedy at law. The action and threatened action of the defendants in advertising, offering for sale and selling Seagram products at less than the prices stipulated therefor pursuant to said Fair
123 Trade contracts will result in direct, immediate and irreparable injury to plaintiff, and it is therefore entitled to equitable relief.

Enter this 5th day of December, 1955:

Julius J. Hoffman,
Judge.

124 UNITED STATES DISTRICT COURT

* * (Caption—54-C-832) * *

JUDGMENT FOR PERMANENT INJUNCTION.

This cause having come on for further and final hearing, and the issues therein having been tried before the court without a jury and the evidence of all the parties hereto having been heard, and the court having duly made findings of fact and conclusions of law,

Now it is this 5th day of December, 1955, ordered, adjudged and decreed as follows:

1. Defendants herein,

New Cut Rate Liquors Inc.
Albert Vaitaitis
Jack Levin and Robert Lavine
Henry Newman and Rebecca Newman
Nick Pintozzi
Frank Pintozzi
Diversey Liquors Corporation
Octavio Narcisi, Nick Brunetti and Felix Giannattasio
Jesse Bergandi and Frank Bergandi
B & B Liquors, Inc.
Harry Silverman
David Feltzer
Sam Malkin and Maurice Robin
James L. Horan
Milton M. Chemers
Thomas Pape

Ed's Liquors, Inc.
Friendly Liquor Mart, Inc.
Glenn Liquor Co. Inc.
Binstein, Inc.
Lena Paterno
Martin R. O'Connor and Martin F. Conroy
125 Healie Schwartz and Louis Schwartz
Westown Liquors, Inc.
Ontario Pharmacy, Inc.
McCoy Liquor Stores, Inc.
Roosevelt Wines & Liquors, Inc.
Jack Segal
Soifer & Sons, Inc.
Sun Cut Rate Drugs, Inc.
Leonard L. Freeman
James Castaldo
Harry Schwarzbach
Foremost Promotions, Inc.
Sam Rosen
Jack W. Kerschner
Jack Lavine and Myer L. Fellars
Bill and Rose Ridell
26th and Kedzie Liquor Co., Inc.
Leon H. Phillips
The Real McCoy, Inc.
Morris Rubin
Stanley Lutz
Sun Pay Less Drugs, Inc.
Sun Self-Serv, Drugs, Inc.
Betty Malkin
The Malkin Company, Inc.
Lawrence & Western Wines & Liquors, Inc.
Jack Kanarish
Sylvia, Leonard and Leonore Robins

their officers, agents, servants, employees, attorneys, successors and assigns, and each and every one of them be, and they are hereby jointly and severally forever enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by the plaintiff from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant

to said Act, which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois relating to the sale or resale
126 of any of said Seagram products in that state.

Jurisdiction of this cause is retained for the purpose of giving full effect to this judgment and for the purpose of making such further and other orders and decrees, or taking such further action, if any, as may become necessary or appropriate to carry out and enforce its judgment.

Enter this 5th day of December, 1955:

Julius J. Hoffman,
Judge.

127 And on, to wit, the 3rd day of January, 1956 came the Defendants by their attorneys and filed in the Clerk's office of said Court their certain Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto), And Cost Bond on Appeal, in words and figures following, to wit:

128 UNITED STATES DISTRICT COURT

For the Northern District of Illinois,

Eastern Division.

Seagram-Distillers Corporation, *Plaintiff,* *vs.* New Cut Rate Liquors, Inc., et al., *Defendants.*	Civil Action. Equitable Relief Sought. No. 54 C 832.

NOTICE OF APPEAL.

Notice is hereby given that each and every one of the defendants in this cause hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit, from the order entered by the Honorable Judge Julius J. Hoffman, one of the Judges of the United States District Court, Northern District of Illinois, Eastern Division, on the 5th day of December, 1955, said order granting a per-

manent injunction in favor of the plaintiff and against the defendants, enjoining the defendants, their officers, agents, servants, employees and attorneys from advertising, offering to sell and selling of plaintiff's products at less than the alleged fair trade prices set forth in an alleged fair trade contract entered into pursuant to the provisions of the Illinois Fair Trade Act.

Schultz & Biro,
Attorneys for Defendants,
33 N. La Salle Street #1416,
STate 2-7762.

129 United States of America, } ss:
Northern District of Illinois. }

* * (Caption—54-C-832) * *

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on January 3, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Louis A. Kohn and Patrick W. O'Brien,
Mayer, Friedlich, Spiess, Tierney, Brown and Platt,
231 South La Salle Street,
Chicago 4, Illinois.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 3rd day of January, 1956.

Roy H. Johnson,
Clerk,
By Gizella Butcher
Deputy Clerk.

(Seal)

130 Know all Men by these Presents:

That we, New Cut Rate Liquors, Inc., et al., as principal, and American Bonding Company of Baltimore, as sureties, are held and firmly bound unto Seagram-Distillers Corporation in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said Seagram Distillers Corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 3rd day of January in the year of our Lord one thousand nine hundred and fifty-six.

Whereas, lately at a session of the United States District Court for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Seagram-Distillers Corporation, plaintiff and New Cut Rate Liquors, Inc., et al., defendants an order was rendered against New Cut Rate Liquors, Inc., et al., enjoining the said defendants, their officers, agents, servants, employees and attorneys from advertising, offering to sell and selling of plaintiff's products at less than the alleged fair trade prices, all as more fully set forth in said order and the said New Cut Rate Liquors, Inc., et al., having filed in the Clerk's Office of the said District Court Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, to reverse the order of the aforesaid suit, in the United States Court of Appeals for the Seventh Circuit, to be holden at Chicago within forty (40) days from the date hereof.

Now, the condition of the above obligation is such, that if the said New Cut Rate Liquors, Inc., et al., shall pay the costs if the appeal is dismissed or the order affirmed, or pay such costs as the appellate court may award if the order is modified then the above obligation to be void: otherwise to remain in full force and virtue.

Louis L. Biro,
(Seal) *Agent and Atty. in Fact for New Cut Rate Liquors, Inc. et al.,*

American Bonding Company of Baltimore,
By: Roland G. Miller,
(Seal) *Agent and Attorney-in-Fact.*

131 And on the same day, to wit, the 3rd day of January, 1956 came the Defendants-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Statement of Points On Appeal, And Designation Of Contents Of Record, in words and figures following, to wit:

132 UNITED STATES DISTRICT COURT.

* * (Caption—54-C-832) * *

STATEMENT OF POINTS ON APPEAL.

Defendants-Appellants herewith present the points upon which they claim the Court erred:

1. Plaintiff failed to establish Federal jurisdiction, in that it failed to present competent evidence that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

2. The form of a contract which plaintiff did introduce into evidence did not contain the immediate vendor-vendee relationship required by the provisions of the Illinois Fair Trade Act.

3. Plaintiff failed to establish equity jurisdiction, in that it failed to prove by competent evidence any specific damages to it.

4. Evidence introduced by defendents and stipulated to by the plaintiff proved abandonment by plaintiff of its alleged fair trade contract.

133 5. The Illinois Fair Trade Act is unconstitutional, in that when it was enacted by the Illinois General Assembly and approved by the Governor, said action was prior to the enactment of the Miller-Tydings Amendment to the Sherman Anti-Trust Act, and of the McGuire Amendment, and thus was contrary to the provisions of the Sherman Anti-Trust Act, as they were at the time that the Illinois Fair Trade Act was enacted; consequently, the Illinois Fair Trade Act offended the supremacy clause, as well as the commerce clause of the Federal Constitution, and, therefore, was void from the day of its passage, insofar as it related to interstate commerce.

6. Rule 65(d) of the Federal Rules of Practice requires that every order granting an injunction be specific in terms and described in reasonable detail and not by reference to

the complaint or other documents the act or acts sought to be restrained. The order of December 5, 1955, failed to follow the provisions of Rule 65(d) in that it is not specific and does refer to other documents for the act or acts sought to be restrained.

7. This matter should have been remitted to the state courts for a construction of the Illinois Fair Trade Act, to-wit: Whether the provisions of the Act make it compulsory to execute a fair trade contract between an immediate vendor and vendee.

Schultz & Biro,
Attorneys for Defendants.
33 N. La Salle Street, #1416.
STate 2-7762.

134 UNITED STATES DISTRICT COURT.

* * (Caption—54-C-832) * *

DESIGNATION OF CONTENTS OF RECORD.

Defendants, by Schultz & Biro, their attorneys, hereby designate under Rule 75, the following to constitute the transcript of record on appeal in the above entitled cause for immediate certification and transmittal to the United States Circuit Court of Appeals for the Seventh Circuit:

1. Original complaint filed June 9, 1954. (Appellant will file a motion to have transcript of record in case No. 11275, filed in the United States Court of Appeals for the Seventh Circuit, containing this part of the record to be made a part of this appeal.)

2. Verified answer of original defendants filed June 15, 1954. (Appellants will file a motion as set forth in paragraph 1.)

3. Plaintiff's amended complaint filed June 15, 1954, pursuant to Rule 15(a). (Appellants will file a motion as set forth in paragraph 1.)

4. Orders entered on June 16, 1954, (a) giving plaintiff leave to file amended complaint instanter; (b) answer of original defendants filed June 15, 1954, to stand on behalf of additional defendants per amended complaint; (c)
135 five day for plaintiff to file supplemental amended complaint joining three additional retail liquor dealers

as parties defendant, and authorizing the answer of original defendants filed June 15, 1954, to stand on behalf of these three additional defendants. (Appellants will file a motion as set forth in paragraph 1.)

5. Order of July 1, 1954, substituting Feltzer for defendant Cash, and Foremost Promotions, Inc., for Defendant Foremost Liquor Stores, Inc. (Appellants will file a motion as set forth in paragraph 1.)

6. Transcript of all proceedings held before the Honorable Julius J. Hoffman, on June 16, 1954, June 24, 1954 and July 1, 1954. (Appellants will file a motion as set forth in paragraph 1.)

7. Plaintiff's Exhibits 1 through 8, inclusive, which were admitted at the hearing for temporary injunction. (Appellants will file a motion as set forth in paragraph 1.)

8. Defendants' Exhibits 1 and 2, which were admitted at the hearing for temporary injunction. (Appellants will file a motion as set forth in paragraph 1.)

9. Stipulations entered into between the plaintiff and defendants during the hearings on the permanent injunction.

10. Defendants' Exhibit 1, which was admitted at the hearing for the permanent injunction.

11. Plaintiff's Exhibits 1 through 5, inclusive, which were admitted at the hearing for the permanent injunction.

136 12. Transcript of all proceedings held before the Honorable Julius J. Hoffman on November 26, 1955 and December 5, 1955, including case No. 11275 filed in the United States Circuit Court of Appeals for the Seventh Circuit, which was made a part of this record by stipulation between the parties.

13. Findings of Facts, conclusions of law and permanent injunction entered on December 5, 1955.

Schultz & Biro,
Attorneys for Defendants,
33 N. La Salle Street, #1416,
STate 2-7762.

137 And afterwards, to-wit, on the 9th day of February, 1956, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Julius J. Hoffman, to the Clerk of the United States District Court that the District Judge, appears the following entries, to-wit:

138 UNITED STATES DISTRICT COURT.

* * (Caption—54-C-832) * *

ORDER.

Pursuant to notice of appeal filed by the defendants, in the above entitled cause on the 3rd day of January, 1956 with the Clerk of the United States District Court;

It Is Hereby Ordered that leave be and is hereby given to the Clerk of the United States District Court that the original plaintiff's exhibits numbered 1 through 5, and defendants' exhibit number 1, and stipulations entered into between the plaintiff and defendants may be certified in lieu of copies thereof.

Enter:

Julius J. Hoffman,
Judge.

Dated: February 9, 1956.

139 Endorsed: United States District Court * *(Caption)—54-C-832) * * Order.

140 UNITED STATES DISTRICT COURT.

* * (Caption—54-C-832) * *

On motion of the plaintiff-appellee by its counsel it is Ordered that leave be and hereby is granted to the plaintiff-appellee to designate its Exhibit 6 as part of the record on appeal in this cause.

141 UNITED STATES DISTRICT COURT.
(Caption—54-C-832)

On motion of the plaintiff-appellee by its counsel it is Ordered that leave be and hereby is given to the Clerk of this Court to certify the original plaintiff's Exhibit 6 to the United States Court of Appeals for the Seventh Circuit.

143 United States of America, }
Northern District of Illinois. } ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the Proceedings had of record made in accordance with the Designation of Contents of Record on Appeal filed in this Court in the cause entitled: Seagram-Distillers Corporation, Plaintiff, *vs.* New Cut Rate Liquors, Inc., et al., Defendants No. 54-C-832, as the same appear from the original records and files thereof now remaining among the records of said Court in my office, except items 1 through 8 both inclusive of defendants'-Designation of record included here by inserting, at the direction of counsel, a printed copy of the record in a previous appeal in which full captions of the documents listed as said items 1 through 8 are omitted and except defendants' Exhibit number 1, and Plaintiff's Exhibits numbered 1 through 6, which are included originally in this record by order of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 13th day of February, 1956.

Roy H. Johnson,
(Seal) *Clerk,*
By Beverly V. Peters,
Deputy Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 353

SEAGRAM-DISTILLERS CORPORATION,
Petitioner,

vs.

NEW CUT RATE LIQUORS, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

SEAGRAM-DISTILLERS CORPORATION,
Petitioner,

vs.

NEW CUT RATE LIQUORS, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Seagram-Distillers Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled case on May 23, 1957.

CITATIONS TO OPINIONS BELOW.

The opinions of the Court of Appeals, which are unreported, are printed in Appendix A hereto, *infra*, pp. A1-15.

An earlier opinion of the Court of Appeals affirming a preliminary injunction issued by the District Court is reported in 221 F. 2d 815, certiorari denied, 350 U. S. 828. The District Court's Findings of Fact, Conclusions of Law and Order with respect to the preliminary injunction

(I R. 30-35) are printed in Appendix B hereto, *infra*, p. A16. The District Court's Findings and Conclusions on final hearing are found at II R. 57-60.[1]

JURISDICTION.

The judgment of the Court of Appeals was entered on May 23, 1957. A timely petition for rehearing was filed on June 7, 1957 and denied on June 24, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTIONS PRESENTED.

1. Whether in a diversity case where a plaintiff seeking an injunction, charges wrongful acts "which have, or will, injure a right" for which protection is sought, the jurisdictional amount is measured by the value of the right to be protected, or by the dollar amount of the injury caused or threatened.

2. Whether the court below violated Rule 52(a), Federal Rules of Civil Procedure, in disregarding uncontradicted evidence which showed that, even on the court's own theory, the injury to plaintiff caused by defendants' conduct would exceed $3,000.

STATUTES INVOLVED.

The statutes involved are 28 U. S. C. A. § 1332 and the Illinois Fair Trade Act, Ill. Rev. Stat. (1955), c. 121½, §§ 188-191, which are printed in Appendix C, *infra*, p. A23.

1. The record in the proceeding in which the preliminary injunction was granted (No. 11275 in the Court of Appeals; No. 137, 1955 Term in this Court) is cited as (I R. . . . .). The record on final hearing (No. 11685 in the Court of Appeals) is cited as (II R. . . . .). The latter by stipulation includes the former. (II R. 7). Ten copies of only the latter part of the record are presently available for distribution to the Court. Pertinent portions of the first part of the record, which is included in the certified transcript, are quoted herein.

STATEMENT OF THE CASE.

In June, 1954 petitioner (hereafter referred to as plaintiff), a Delaware corporation, as the sole person authorized to distribute Seagram alcoholic beverages in Illinois, filed an action to enjoin 52 defendants, respondents herein, liquor retailers in the City of Chicago and citizens of Illinois, from willfully and knowingly advertising or selling Seagram products at less than the prices stipulated by plaintiff in accordance with the Illinois Fair Trade Act (I R. 12-19). Defendants had, in a cooperative advertisement published June 15, 1954, in a Chicago daily newspaper, advertised Seagram products at prices below those stipulated by plaintiff (I R. 46). There is no issue as to defendants' violations of plaintiff's Fair Trade prices.

Plaintiff obtained a temporary restraining order on the same day as the advertisement (I R. 21), which remained in effect until its motion for a preliminary injunction was heard (I R. 24, 27). On July 2, 1954, the District Court issued a preliminary injunction after a hearing and the taking of testimony (App., *infra*, p. A16).

This injunction was affirmed by the Court of Appeals, 221 F. 2d 815 (C. A. 7, 1955). This Court denied certiorari, 350 U. S. 825 (1955). The issue as to whether there was sufficient proof of the jurisdictional amount was argued in both courts.[2]

When the case came on for final hearing the transcript of the proceeding in which the preliminary injunction was granted was stipulated into the record (II R. 7). Certain facts were stipulated by the parties (II R. 5-7), but no additional evidence was introduced on the question of jurisdictional amount. The record on that point thus included

2. See appellant's brief in the Court of Appeals, No. 11275, pp. 15-27; appellee's brief, pp. 24-26; petition for certiorari, No. 137, 1955 Term, p. 20; brief in opposition, pp. 11, 12.

the same evidence as before.[3] The testimony on the point was as follows:

Plaintiff's products are sold under trade names which are widely and favorably known in Illinois (II R. 6, quoted in n. 3). The plaintiff here has executed over 5,000 Fair Trade contracts with Illinois retailers for Seagram products (I R. 98). "The total amount of expenditures * * * in Illinois during the past two or three years in advertising Seagram products * * *" was "a little in excess of $3,000,000" for advertising, as well as promotional work (I R. 86-7). Seagram sells "around 780,000" cases of liquor in Illinois per year (I R. 89); "our volume is greater than anyone else's" (I R. 85).

Two witnesses testified as to the effect of price-cutting in violation of the Fair Trade contracts upon Seagram's sales. Mr. Teece, Vice President in charge of plaintiff's Central Division, was asked (I R. 84):

> "Q. Mr. Teece, based on your experience of more than fifteen years in the liquor industry—
>
> A. 22.
>
> Q. —and your fifteen years with Fair Trade enforcement, and Fair Trade Policy in Illinois, will you tell the Court what in your opinion would be the result of price cutting on Seagram products, and advertising Seagram products at cut prices unless restrained by court order?
>
> * * * * *

3. In a stipulation on final hearing defendants admitted the allegations of the complaint (I R. 15) that (II R. 6):

> Plaintiff herein has for several years prior to the dates mentioned in the complaint expended large sums of money in advertising Seagram products and during the past several years plaintiff expended for such purpose an amount in excess of Five Hundred Thousand Dollars ($500,000.00) in Illinois alone, and the trade-marks, brands or names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois and plaintiff has sold large quantities of each of said products in Chicago and throughout Illinois.

"The Witness: I think it would be disastrous to at least 70 per cent of the retail outlets. I think it would be a form of price war that would put men on the verge of going out of business. On account of general conditions, I think it would put them out of business.

I think it would cut our volume at least 50 per cent in three months' time." (Italics supplied.)

The Fair Trade prices for Seagram's products ranged from $41.00 to $91.00 per case, with most of the prices over $50.00 (I R. 40). It is to be noted that since Seagram's was selling 65,000 cases per month in Illinois, a reduction of 50% would have amounted to 32,500 cases per month, or over $1,625,000 per month at the retail price level. Even though plaintiff's wholesale prices were considerably lower than the retail, the decline in plaintiff's sales would obviously have greatly exceeded $3,000.

This statement as to loss of sales was corroborated by Mr. Teece's testimony that when the defendants advertised that they intended to sell Seagram products at cut rates, he immediately received telephone calls from many retailers (I R. 80-81). The President of the Illinois Package Association, an association of retailers in Chicago (I R. 81)—

"* * * asked me what Seagrams was going to do. He wanted to know immediately what Seagram was going to do with reference to the price cutting. He said, 'I have your merchandise on the shelf. If you don't do something about it, I will take it off the shelf.'

"He also told me he talked to his members that day and he got the same reaction from them."

Mr. Lind, another witness for the plaintiff, who was Vice President and General Counsel of the parent corporation, testified (I R. 100-101):

"* * * We have found every time there is a price break, our product is subject to loss, and our business has been injured, because we can measure it, because

we can see what happens to us in every jurisdiction where there is a price break. It not only injures us, it injures the whole industry, and it injures retailers; in order to sell their products, at a fair profit, retailers have to make a certain mark up in order to live. If the prices of merchandise are going to be cut by some retailers, the little retailer has to cut the price, which means reducing the profit, *but he doesn't handle the goods any more, and that is where we suffer our loss.*"[4]

* * * * *

"*The good will of the trade mark is absolutely almost lost as the result of a price break.* You can see that in the past history of any other items. You can see that in the liquor industry. They stop making brands where the prices have been cut. *The good will that was built up for that trade mark over a period of years is absolutely* lost. There are any number of instances of that." (Italics supplied.)

On cross-examination, when asked to give an example of "where a brand has gone out of existence" because of price cutting, he testified (I R. 102):

"A. Oh, a brand like P. M. in New York.

Q. What happened to P. M.?

* * * * *

A. It is an almost unknown brand as far as New York is concerned.

Q. Just exactly why did it go out of business?

A. Because it was price cut to the bone where nobody wanted to handle it any more."

None of the above testimony was in any way contradicted, and there is no other testimony in the record bearing upon the question.

The trial court made the same findings of fact as those

4. To the same effect was the conclusion of Louis D. Brandeis, in *Cutthroat Prices. The Competition That Kills*, Harper's Weekly, Nov. 15, 1913, that: "Thus a single prominent price cutter can ruin a market for both the producer and the regular retailer."

which had been upheld by the Court of Appeals on the same record when the temporary injunction was granted. In so far as pertinent here, the findings stated (II R. 57-9; I R. 30-32, App., *infra*, pp. A17-18):

> "2. * * * It [plaintiff] has in the past three years expended approximately $3,000,000 in advertising and promoting the sale of Seagram products in Illinois and the trade-marks, brands and names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois.
>
> * * * * *
>
> "7. Unless enjoined defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby irreparably impairing the value of the trade marks, brands and names under which Seagram products are sold.
>
> "8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to comply with the aforesaid Fair Trade contracts, *will substantially decrease the volume of sales of Seagram products in Illinois*, and will irreparably impair the good will of the plaintiff and the good will of the trade-marks, brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff." (Italics supplied.)

The court concluded that "the matter in controversy * * * exceeds the sum of $3,000" and that the court had jurisdiction of the case (II R. 58, 59).

On the second appeal, the Court of Appeals, with Judge Finnegan dissenting (App., *infra*, pp. A13-15), reversed on the ground that the District Court had erred in holding that the amount in controversy exceeded $3,000 (App., *infra*, pp. A1-12). The court held that the principle that the jurisdictional amount was measured by the value of the object or right to be protected applied only when a right

was threatened with total destruction, and that otherwise the amount of actual or threatened damage must be proved. The court then held that plaintiff had failed to prove that a loss of business exceeding $3,000 would take place. (See App., *infra*, pp. A4, 9.) Plaintiff's petition for rehearing was denied on June 24, 1957.

REASONS FOR GRANTING THE WRIT.

Hitherto in Fair Trade and unfair competition diversity cases the courts have held with substantial uniformity that the jurisdictional amount was measured by the value of the right to be protected, and that this was shown by proof of the value of the good will attached to plaintiff's trade name. By restricting this principle to cases in which the right to be protected is completely destroyed—which would seldom occur in this class of cases—the court below has reached a result in conflict with many cases in this field, as well as with the "principle that jurisdiction is to be tested by the value of the object or right to be protected against interference." *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 181 (1936); *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322, 336 (1906); *Bitterman* v. *Louisville & Nashville R. R.*, 207 U. S. 205, 225 (1907); *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121, 125 (1915).[3]

In any event, in this case the evidence set forth in the statement shows that even on the Court's own theory there was uncontradicted proof that the injury or damage to plaintiff's rights would exceed $3,000. The decision below in this aspect is in conflict with the decision of the Court of Appeals for the First Circuit in *Lee-Wilson, Inc.* v. *General Electric Company*, 222 F. 2d 850 (C. A. 1, 1955), in which on evidence less substantial than here the Fed-

3. Cases are collected in Annot., 30 A. L. R. 2d 707-721 (1951).

eral court was held to have jurisdiction in a Fair Trade case.

1. The Fifth, Sixth, Eighth, Ninth and Tenth circuits (as well as the Seventh in earlier cases)[6] have held that in unfair competition cases the jurisdictional amount is established by proof that the good will embodied in the plaintiff's trade name has a value exceeding $3,000.

In *Indian Territory Oil & Gas Co.* v. *Indian Territory Illuminating Oil Co.*, 95 F. 2d 711 (C. A. 10, 1938), certiorari denied 305 U. S. 607 (1938), where an injunction was sought to prevent injury to the good will in plaintiff's trade name, the court relied entirely on evidence that plaintiff's assets exceeded $100,000,000 in book value and that its good will had a "monetary value of $100,000." The Tenth Circuit's opinion stated (95 F. 2d at 713):

> "* * * it is said that the evidence fails to show that plaintiff has suffered damages in excess of $3,000, and from this premise it is argued that the sum requisite to jurisdiction is not in controversy. The test, in determining the amount in controversy in a case of this kind presenting a continuing wrong to an established business growing out of unfair trade practices, is not the immediate pecuniary damages arising from the wrongful acts. *It is the value of the business or the right to be protected;* and business reputation or good will is an intangible asset to be taken into consideration in ascertaining the extent of the business or right. * * *" (Emphasis added.)

In *Hanson* v. *Triangle Publications*, 163 F. 2d 74, 79 (C. A. 8, 1947), certiorari denied 332 U. S. 855 (1948), the Eighth Circuit relied upon evidence as to the plaintiff's magazine's circulation, advertising rates, and initial promotion costs as proof of the jurisdictional amount in a suit for infringement of trade name. That court had previously

6. *Harvey* v. *American Coal Company*, 50 F. 2d 832, 834 (C. A. 7, 1931), and the first decision by the court below in this case, 221 F. 2d 815.

held in a similar case that "the sum in controversy is not alone the damage which is claimed to have been done by the defendants but is the value of the property interest in that trade name." *Beneficial Industrial Loan Corporation* v. *Kline*, 132 F. 2d 520, 525 (C. A. 8, 1942), citing the *Indian Territory* case.

In *Ross-Whitney Corp.* v. *Smith Kline & French Laboratories*, 207 F. 2d 190, 194 (C. A. 9, 1953), the Court of Appeals for the Ninth Circuit declared that:

> "* * * the District Court's finding that the amount in controversy exceeds $3,000 is supported by the evidence that SKF had a substantial investment in Dexedrine and its peculiar shape-color-size combination by virtue of the $1,200,000 spent in advertising alone from May 1949 to September 1951."

The court cited its own earlier holding in *Del Monte Special Food Co.* v. *California Packing Corp.*, 34 F. 2d 774, 776-7 (C. A. 9, 1929), that an allegation "that the value of the good will involved is more than $2,000,000 and more than $11,000,000 has been spent in advertising" is sufficient.

The Fifth Circuit, in *Seaboard Finance Company* v. *Martin*, 244 F. 2d 329, 330 (C. A. 5, 1957), held that allegations of substantial expenditures for advertising and a large volume of business were sufficient on a motion to dismiss to establish that the value of the "good will" represented by a "trade name" exceeds $3,000.

In *Wisconsin Electric Co.* v. *Dumore Co.*, 35 F. 2d 555, 556-7 (C. A. 6, 1929), the Sixth Circuit reversed a District Court holding that the value in controversy was "the damage to the complainant," and held that the value of plaintiff's trade name, which was the right sought to be protected, was the criterion.

The Fourth Circuit has also "expressly held that in a suit of this kind the value of the good will is the amount in controversy." *Safeway Stores* v. *Suburban Foods*, 130

F. Supp. 249, 252 (E. D. Va., 1955), referring to *General Shoe Corporation* v. *Rosen*, 111 F. 2d 95, 99 (C. A. 4, 1940).[7]

This Court pointed out in *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183 (1936) that (p. 193) "The essence of the statutory violation" under the Fair Trade acts consists "in a forbidden use of the trade-mark, brand or name in accomplishing" the disposition of the product. "The primary aim of the law is to protect the property—*namely, the good will*—of the producer, which he still owns." (*Ibid.*) The statute "proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand *is an assault upon the good will*, and constitutes what the statute denominates 'unfair competition'" (p. 195). "And *good will is property in a very real sense*, injury to which, like injury to any other species of property, is a proper subject for legislation. Good will is a valuable contributing aid to business—sometimes the most valuable contributing asset of the producer or distributor of commodities. And distinctive trade marks, labels and brands, are legitimate aids to the creation or enlargement of such good will" (p. 194). (Italics supplied.)

Thus the Fair Trade acts, like the trade name cases, are designed to protect the good will inherent in the trade name. The cases under the Fair Trade statutes, up to this one, have held that sale at less than the price fixed was an "assault upon the good will," and that the value of the right to be protected, as proved by evidence as to the volume of sales and the amount spent for advertising, was sufficient to establish the jurisdictional amount. *Miles Laboratories* v. *Seignious*, 30 F. Supp. 549, 554 (E. D. S. C., 1939); *Caron Corp.* v. *Wolf Drug Co.*, 40 F.

7. The Fourth Circuit's opinion in the *General Shoe* case disposed of the question without discussion. The District Court in the *Safeway* case examined the briefs in the *General Shoe* case in order to analyze the holding on this issue.

Supp. 103, 105 (N. J., 1941); *General Electric Co.* v. *Sabreen*, 128 F. Supp. 900, 901 (E. D. Pa., 1953); *Calvert Distilling Co.* v. *Brandon*, 24 F. Supp. 857 (W. D. S. C., 1938); *James Heddon's Sons* v. *Callender*, 28 F. Supp. 643 (Minn., 1939); *Calvert Distilling Co.* v. *Rosen*, 115 F. Supp. 146, 147 (N. D. Ill., 1953); *Sunbeam Corp.* v. *Richardson*, 144 F. Supp. 583, 587 (W. D. Ky., 1956), reversed on other grounds 243 F. 2d 502 (C. A. 6, 1957).[8]

In the *Miles Laboratories* case, which was subsequently cited and quoted approvingly by the Third Circuit as "perhaps the latest expression of the doctrine" (*John B. Kelly, Inc.* v. *Lehigh Nav. Coal Co.*, 151 F. 2d 743, 747 (C. A. 3, 1945), certiorari denied, 327 U. S. 779 (1946)), the court stated (30 F. Supp. at p. 554):

> "* * * it is a firmly established principle of law that when a litigant seeks an injunction to protect a right, and shows that some invasion of that right has occurred, or been threatened, the test of the jurisdictional amount is the value of the right that is to be protected, and not the extent of the monetary loss or damage that has been suffered or is threatened by the invasion. The reasons for this rule are so obvious, and have been so frequently pointed out in the cases cited, that further discussion of them here can add nothing to what has previously been said.
>
> "The factual allegations of the complaint as to the amount in controversy are directed to that principle of law. They seek to show the value of the right of the plaintiff to sell its product in South Carolina, and to realize upon the value of its goodwill therein

8. In *Schweigmann Bros.* v. *Calvert Distilling Corp.*, 341 U. S. 384 (1951), the allegation was that plaintiff's business, good will and trade-marks were of a value in excess of $3,000 (Tr. of Rec. No. 442, 1950 Term, page 3), and the finding was that plaintiff's rights as sole distributor of Calvert products in Louisiana were worth substantially in excess of $3,000 (*id.* at 84). All parties assumed that this was sufficient for jurisdictional purposes, although it would not be adequate under the rule adopted by the court below.

established, all of which it claims is threatened with disruption by the price-cutting activities of the defendant. The court has no difficulty in reaching the conclusion, from the vast amount spent by the plaintiff in advertising and the resulting substantial volume of sales of its product, that the value of its right to distribute this product to the public in South Carolina is substantially in excess of the jurisdictional amount."

In the other Fair Trade cases cited the evidence was substantially the same. In all, the evidence was precisely what the Court of Appeals found to be inadequate here. It is to be noted that in none of these Fair Trade cases was it said that the good will inherent in plaintiff's trade name or its right to sell its product was completely destroyed by defendant's infringement of plaintiff's rights. The court below has held, however, that unless such complete destruction of the right involved is proved, the test is the amount of damage, not the value of the right. Under this rule all of the decisions referred to—both Fair Trade and unfair competition—were incorrectly decided.

The departure by the Seventh Circuit from the principle which it and other courts of appeals and district courts have been applying in this important field of the law for many years will create uncertainty and confusion which can only be resolved by this Court.

2. The court below rested its ruling on this Court's decisions in *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1936) and *KVOS* v. *Associated Press*, 299 U. S. 269 (1936), as contrasted with *Gibbs* v. *Buck*, 307 U. S. 66 (1939).

It is to be noted that the decisions of the Fifth, Eighth, Ninth, Tenth, Third and Fourth circuits referred to above, as well as the many Fair Trade cases in the district courts, were decided after the *McNutt* and *KVOS* cases. Those

decisions were found to be distinguishable in the *Kelly* and *Caron* cases, *supra*. Whether and how the *McNutt* and *KVOS* cases are to be applied to the present type of situation is a matter on which the other lower courts are obviously not in agreement with the Seventh Circuit and upon which guidance by this Court is necessary.

Those cases did not change the general rule for measuring the amount involved in injunction cases. On the contrary, this Court in *McNutt* reiterated the principle that the value of the object or right to be protected against interference is the standard for measuring the amount involved. In that case an injunction was sought against enforcement of a state law regulating installment sales, and the evidence related to the over-all amount of business done. The Court pointed out that the right to be protected was not the *broad* right to conduct the business, which would be measured by the value of the business, but the *specific* right to be free from regulation by the state (298 U. S. 181).

In *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269 (1936), which involved a radio station's use without permission of Associated Press bulletins, evidence as to the general magnitude of the Associated Press operations was held to be "irrelevant upon the issues of the value of the right for which protection is here sought" (p. 280). Indeed, the Associated Press failed to show that it would suffer any injury at all since it made no profit from furnishing news to its members (299 U. S. 278, 279).

McNutt and *KVOS* thus do not hold, as suggested by the court below (App., *infra*, pp. A4-6, 9), that a plaintiff charging injury to a right must always prove the amount of injury it would suffer. They recognize that plaintiff may prove the value of the specific right to be protected. *But in those cases plaintiff proved the value of the wrong right.*

Here plaintiff's evidence as to large amounts spent for advertising and the volume of sales—even apart from but certainly in combination with the evidence that retailers *would take* Seagram's products "off the shelf" and that sales would be substantially curtailed—established that the good will in plaintiff's trade names far exceeded $3,000 in value, and also that this was true as to the value of the right of plaintiff to have its products sold at the stipulated prices. Since the *Old Dearborn* case, *supra*, this has been universally recognized to be the right sought to be protected in Fair Trade cases.

3. The decision below is inconsistent even with the court's own theory, since uncontradicted evidence shows that plaintiff will suffer much more than $3,000 in damages from defendants' price cutting. Indeed, the evidence here is far stronger than that held by the First Circuit to be sufficient in *Lee-Wilson, Inc.* v. *General Electric Co.*, 222 F. 2d 850 (C. A. 1, 1955).

In the *Lee-Wilson* case, which involved the Massachusetts Fair Trade law, the verified complaint was treated by the Court of Appeals as an affidavit. It alleged (222 F. 2d at 852-3):

> "(1) That the plaintiff had 'expended large sums of money in promoting and advertising said electrical appliances and had established a valuable reputation and good will for the same and for the trade-mark under which they are produced and sold';
>
> "(2) That said trade-mark had a value in excess of $3,000.00;
>
> "(3) That 'the unlawful acts of the defendant, past and threatened, 'have caused and threaten to continue to cause irreparable damage to plaintiff and tend to impair and destroy plaintiff's valuable good will and the value of plaintiff's trade-mark.'
>
> "(4) As a result of the said unlawful acts, other retailers in competition with defendant are placed at

> a competitive disadvantage and therefore purchase fewer of said appliances for resale, promotion of said appliances through cooperative advertising is adversely affected, the threat of a price war exists, and the plaintiff's trade-mark under which said appliances are sold is brought into disrepute with both dealers and the general public.' "[9]. [Numbers and paragraphing supplied.]

Nothing in the *Lee-Wilson* record stated specifically the amount spent for advertising or the quantity of plaintiff's sales or the amount of the loss of sales resulting from the price cutting, or indeed that any of these exceeded $3,000. In the instant case the record contains not merely such general statements as to the amount spent for advertising, and the effect upon plaintiff's trademark and sales, but specific testimony that plaintiff's expenditures for advertising and promotion were over $3,000,000 (I R. 87); that it sold 780,000 cases of whiskey in Illinois per year (I R. 89), the retail price for which would be about $39,000,000, or $3,250,000 per month (II R. 38); and that price-cutting in violation of Seagram's Fair Trade prices "would cut our volume at least 50 per cent in three months' time" (I R. 84, quoted at pp. 4, 5, *supra*).

The court below completely disregarded this last part of Mr. Teece's evidence,[10] which proves that plaintiff was threatened with damage greatly in excess of $3,000 under any theory. Since this evidence was uncontradicted, and indeed undisputed, the court's reversal of the District Court's findings without consideration of this evidence was

9. The above excerpt from the opinion of the Court of Appeals is in substance a complete quotation of all of the pertinent portions of the record in the *Lee-Wilson* case. (See Record Appendix to Brief for the Appellant, Oct. Term, 1954, No. 1944, C. A. 1, pp. 3-5.)

10. It is difficult to understand how or why the court below could have overlooked this testimony, since it was quoted in the court's first opinion. 221 F. 2d, at 877.

a clear violation of Rule 52(a) of the Federal Rules of Civil Procedure, which requires a reviewing court to consider "the entire evidence." *United States* v. *United States Gypsum Co.* 333 U. S. 364, 395 (1948); *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339 (1952); *McAllister* v. *United States*, 348 U. S. 19, 20 (1954).

The opinion below does refer to the testimony of Mr. Lind (I R. 100-101, quoted at pp. 5, 6, *supra*) that:

> "* * * We have found every time there is a price break, our product is subject to loss, and our business has been injured, because we can measure it; because we can see what happens to us in every jurisdiction where there is a price break."

The witness further stated (*ibid.*):

> "If the prices of merchandise are going to be cut by some retailers, the little retailer has to cut the price, which means reducing the profit, *but he doesn't handle the goods any more, and that is where we suffer our loss.*
>
> * * * * *
>
> "The good will of the trade mark is *absolutely almost lost* as the result of a price break. * * * The good-will that was built up for that trade mark over a period of years is *absolutely lost.* * * *" [Italics supplied.]

The court apparently deemed this passage insufficient because it contained no measurement of the extent of injury. But this testimony alone is the equivalent of that found by the First Circuit to be sufficient in the *Lee-Wilson* case, where the averments were that "other retailers * * * purchased fewer of said appliances for resale," and that "the plaintiff's trade-mark under which said appliances are sold is brought into disrepute." Neither Mr. Lind nor the *Lee-Wilson* deponent specifically stated that the loss of sales would exceed $3,000, although in the

one situation as in the other the court could reasonably have so inferred from the magnitude of the operations.

Thus, even if Mr. Teece's testimony as to the amount of damages be overlooked, as it seems to have been by the court below, the evidence which it did consider is substantially identical with that upon which the First Circuit reached a contrary result.[11] It is clear, therefore, that evidence which is deemed sufficient to show the jurisdictional amount in the First Circuit—and we believe also in the other Circuits as well (see pp. 8-13, *supra*)—is not sufficient in the Seventh Circuit.

The court below overturned the District Court's decision in the instant case on the theory that the District Court had merely looked "at the evidence of what was spent in building good will and then, [since] the amount [was] substantial," surmised, "that the amount of the loss is $3,000 or more" (App., *infra*, pp. A9-10). This conclusion was based on a remark uttered by the District Court in another connection, in which the District Court stated that the theory of the plaintiff's action was that as a result of defendants' practices "a loss will result, and a loss probably has resulted because of the advertisement, and because of the cut in prices * * *." (I-R. 103, quoted in opinion below, App., *infra*, p. A10, n. 3.) This statement on its face does not suggest that the District Court did not take into account the actual loss to plaintiff; if it indicates anything, it is the contrary.[12] More importantly, the court below disregarded the District

11. The opinion below implies (App., *infra*, p. A9) that Mr. Lind was about to furnish evidence as to the amount of damages, but that the questioning stopped short of this point. The court overlooked the fact that Mr. Teece had given testimony as to the amount of damages. It was unnecessary for both witnesses to do so.

12. It is to be noted that this statement was made during the hearing on the preliminary injunction, and that the court below affirmed the order made by the District Court at the close of that record.

Court's actual finding (II R. 58-9, quoted at p. 7, *supra*) that the defendant's conduct "will substantially decrease the volume of sales of Seagram products in Illinois * * *." In setting aside the District Court's decision without mentioning either the uncontradicted testimony supporting such finding or the specific finding based upon such evidence, the court below has so flagrantly violated Rule 52(a) as to call for the exercise of this Court's supervisory corrective authority.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

No. 11685 SEPTEMBER TERM, 1956 APRIL SESSION, 1957.

SEAGRAM-DISTILLERS CORPORATION, a Delaware corporation,
Plaintiff-Appellee,

v.

NEW CUT RATE LIQUORS, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 23, 1957.

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Defendants appeal from a judgment of the district court, entered December 5, 1955, which permanently enjoined them from offering for sale or selling Seagram products at less than the prices stipulated by plaintiff from time to time under the Illinois Fair Trade Act[1] and in accordance with contracts made pursuant thereto.

Based upon plaintiff's amended complaint, which defendants answered, the district court, after hearing evi-

1. Ch. 121½, Illinois Revised Statutes, 1955, Sec. 188, *et seq.*

dence, on July 2, 1954 granted a preliminary injunction, having found that action necessary to preserve the *status quo*. We affirmed. 221 F. 2d 815; certiorari denied, 350 U. S. 828.

On final hearing of the case, the district court heard additional evidence and, by stipulation, also considered the evidence heard on the motion for preliminary injunction.

The amended complaint alleges that plaintiff is a Delaware corporation and a citizen of that state, and defendants are citizens and residents of the state of Illinois. It expressly alleges that this is a suit between citizens of different states, and the matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

It further appears therefrom that plaintiff is the sole authorized Illinois distributor of Seagram beverages, which it sells under the trademarks, brands and names of the producers thereof, and that defendants are engaged in the retail liquor business in Illinois. Plaintiff has expended in Illinois over $500,000 in advertising Seagram products, having sold large quantities thereof in that state.

It is also charged that plaintiff executed fair trade contracts, in accordance with the Illinois Fair Trade Act, with large numbers of retailers in Illinois, and announced stipulated retail prices of Seagram products, that notice thereof was given to defendants and that they continued advertising, offering for sale or selling of Seagram products at less than the stipulated prices, to the irreparable damage of the good will and business of the plaintiff, that, unless defendants are enjoined, plaintiff will suffer further irreparable damage in a decrease in its sales and others dealing in said products will fail to comply with its fair trade contracts, all to the great damage and financial loss of plaintiff.

Federal jurisdiction was challenged by defendants, both

in their answer and by a motion made at the time of the final hearing on the merits. They now argue that plaintiff failed to establish federal jurisdiction in that no competent evidence was introduced to prove that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.

1. Plaintiff in such a case must carry throughout the litigation the burden of showing that it is properly in court. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269. If its allegations of jurisdictional facts are challenged by its adversary in any appropriate manner, it must support them by competent proof. *McNutt* v. *General Motors Corp.*, 298 U. S. 178, 189.

In an attempt to sustain its burden, plaintiff succeeded in introducing, over the objection of defendants as to its competency, evidence which, plaintiff contends, tended to prove the value of its good will in the Seagram products. Its witness Teece testified that "for the past two or three years, in excess of $3,000,000 was spent by plaintiff in Illinois advertising, as well as promotion, and outdoor signs." Thereon the district court made a finding of fact that the matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000. It thereupon concluded that it had jurisdiction.

In *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, which upheld the constitutionality of the Illinois Fair Trade Act, the court, at 195, referred to section 2 of the act, which reads:

> "Section 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

It said that section 2 "interferes only when he [purchaser of the commodity] sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury". At 198, it added:

> "* * * the sole purpose of the present law is to afford a legitimate remedy for an *injury* to the good will which results from the use of trade-marks, brands or names, * * *." (Italics supplied.)

The district court did not note that, when the $3,000 requisite for jurisdiction[2] is challenged in an action brought in a federal court for the protection of a right belonging to plaintiff, there is an important distinction between two classes of diversity cases.

In one class (which we shall call class A), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which have, or will, injure or damage a right for which plaintiff seeks protection. In such a case, if plaintiff shows that the alleged *injury or damage* caused or threatened by a defendant, or by several defendants acting jointly, amounts to at least $3,000, the federal court has jurisdiction.

In the other class of diversity cases (which we shall call class B), a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which, if not prevented, will completely deny or destroy the right for which plaintiff seeks protection. In such a case, if plaintiff shows that the right is worth at least $3,000, the federal court has jurisdiction.

This distinction is made apparent by cases to which we now refer.

2 28 U. S. C. A. § 1332.

CLASS A.

In *McNutt* v. *General Motors Corp.*, 298 U. S. 178, General Motors sued in a federal district court to restrain the enforcement of an Indiana act providing for the regulation of the business of purchasing contracts arising out of retail installment sales, on the ground that the act was invalid. Although the complaint, to show federal jurisdiction, set forth the net worth of General Motors' business in Indiana covered by the act and other facts tending to prove the value of its right to carry on that business in that state, the court, at 181, said:

> "Respondent [General Motors] invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. * * * But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

In *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, Associated Press sued in a federal district court to enjoin

the proprietor of a radio station from pirating news gathered by Associated Press for use of its members. The district court held that the jurisdictional requirement now under consideration had not been met, and dismissed the suit. The Court of Appeals disagreed and held that Associated Press had shown the requisite fact of jurisdiction. The Supreme Court reversed the Court of Appeals, pointing out, at 278, that the only attempt by Associated Press to show jurisdiction by competent proof was an affidavit to the effect that payments made by newspaper members for news sold to them by Associated Press were upwards of $8,000 per month, "* * * 'which is being imperiled and jeopardized by the acts of defendant * * * and said sum greatly exceeds the sum of Three Thousand Dollars, exclusive of interest and costs, and complainant is in danger of losing said memberships and payments if defendant's practices in respect to pirating said news is not enjoined.'" The Supreme Court, at 279, in rejecting this attempt to show jurisdiction, said "no intimation is given of the character or extent of the damage they [the members] would suffer by such withdrawal. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

CLASS B.

In *Gibbs* v. *Buck*, 307 U. S. 66, a class suit was filed by and on behalf of the members of a society against the Florida attorney general and others charged with the enforcement of a state act directed at organizations like the society. The complaint charged that the act was unconstitutional and deprived complainants of rights without due process of law and without equal protection of the laws, etc. By a motion to dismiss, the defendants urged that the

complaint affirmatively showed that the jurisdictional amount of $3,000 was not involved. The court, at 74, said:

> "The essential matter in controversy here is the right of the members, in association through the Society, to conduct the business of licensing the public performance for profit of their copyrights. This method of combining for contracts is *interdicted* by the Florida statute. It is not a question of taxation or regulation but *prohibition*. Under such circumstances, the issue on jurisdiction is the value of this *right* to conduct the business free of the *prohibition* of the statute. * * *" (Italics supplied.)

After pointing out the facts in the complaint relating to the value of this right, the court, at 75, said:

> "* * * From these facts, the finding of the District Court that the matter in controversy—the value of the aggregate *rights* of all members to conduct their business through the Society—exceeds $3,000 in value is fully supported." (Italics supplied.)

The court pointed out that the test was different in the *McNutt* and *Associated Press* cases, *supra*, stating, at 75:

> "*McNutt* v. *General Motors Acceptance Corp.* differs. There the State of Indiana had passed an act regulating, not prohibiting, the business of the Acceptance Corporation. The right for which protection was sought was the right to be free of regulation. It was to be measured by the loss, if any, following enforcement of regulation. This was not alleged or proved. In *KVOS, Inc.* v. *Associated Press*, relief was sought to enjoin alleged pirating, by radio, of news furnished by the Associated Press to its members. The right for which protection was sought was 'the right to conduct those enterprises free of' interference. On the issue of the value of this right, it was deposed only that the Associated Press received more than $8,000 per month for news in the territory served by the broadcasting station and was in danger of losing the payments. The Associated Press was a nonprofit corporation, op-

erated without the purpose of profiting from its services to members and equitably dividing the expenses among them. The damage in the *Associated Press* case was to its members and this was not shown. Neither was it alleged or proved that any member threatened to withdraw or to reduce its payments."

In *Brotherhood* v. *Pinkston*, 293 U. S. 96, a widow, for the purpose of protecting her right to future participation in a fund from which she was entitled to receive a pension in monthly payments during her lifetime as long as she remained unmarried, brought a suit in a federal district court which dismissed the suit on the ground that the requisite amount of $3,000 was not involved. The Supreme Court, at 99, treated the value of the widow's interest in the fund as the test of jurisdiction. It pointed out that her life expectancy was shown to bring the value of the future pension installments to a sum in excess of $3,000 despite the contingency of her remarriage. The court held that federal jurisdiction existed.

In *Berryman* v. *Board of Trustees of Whitman College*, 222 U.S. 334, a college sued in a federal circuit court to enjoin the collection of taxes on its property on the ground that a perpetual contract of exemption from taxation involved the amount essential to sustain federal jurisdiction, where the contract right exceeded in value that amount, although the current taxes assessed and levied were less than that sum. The defendants challenged jurisdiction. The Supreme Court held that the lower court had jurisdiction because the value of the thing at issue, the contract right, exceeded in value the then jurisdictional requirement of $2,000. It pointed out that the claimed exemption covered, not only a current tax of $946.32, but extended to all future taxes.

In the record before us there is no evidence that the monetary value of the damage or injury to plaintiff's good

will, sustained or threatened by defendants' acts, exceeds $3,000. It appears that its witness Lind was about to furnish evidence which might have been relevant on that point. He was general counsel for plaintiff and he was permitted, over objection, to testify that in a price war in the liquor market "our product is subject to loss, and our business has been injured, *because we can measure it*, because we can see what happens to us in every jurisdiction where there is a price break." (Italics supplied.) The measure to which he referred was not otherwise identified or produced in court. Whether the measure was accurate we do not know. Lind's reference to it indicates that he, a lawyer and business man acquainted with plaintiff's affairs, recognized that the injury claimed to result to plaintiff's business in a price break was susceptible of pecuniary measurement which could be adduced in an effort to prove jurisdiction. On that issue competent evidence of the character and extent of the damage to good will would have been relevant.

Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business. The damage to plaintiff's good will caused or threatened by defendants' acts is the subject of controversy in this case. Plaintiff has failed to prove any facts showing what, if any, curtailment of business and consequent loss have been or are likely to result from defendants' acts. *McNutt* v. *General Motors Corp.*, 298 U.S. 178, 181.

It is improper, in the absence of evidence of the amount of damage sustained or threatened, to look at the evidence of what was spent in building good will and then, if the amount be substantial, to surmise that the amount of the loss is $3,000 or more. Yet this is, in effect, the method by which the district court, in stating its theory of this action,

reached the conclusion that it had jurisdiction.[3] A similar method of reasoning was disapproved by the Supreme Court in *KVOS* v. *Associated Press*, 299 U. S. 269, at 276:

> "* * * Dealing with the petitioner's insistence that the amount in controversy was not shown to exceed three thousand dollars the court [Court of Appeals] held * * * that 'The several millions of dollars here alleged to be invested in the Association's business * * * may well be damaged to the extent of $3,000 by the pirating practices described.' After referring to the character and scope of the respondent's activities the court states:
>
> > 'It is obvious that the business of gathering and distributing to members, *before* profitable publication, *could conceivably be damaged* to the extent of $3,000 by the misappropriation and premature publication of the news material. To hold otherwise would warrant the inference that no corporation could be damaged by a wrongful attack on its business, when that business happened to be run at no profit or at a loss. Also, we are unable to hold irrational the claim that the piracy caused a $3,000 damage to the Association's quasi property right in the news.'" (Italics supplied except word "before".)

and at 277:

> "* * * The complaint contains nothing to the purpose save the general statement that the damage to which the respondent is being subjected is in excess of three thousand dollars and the amount involved is in excess

3. The following colloquy occurred.

"The Court: The theory of this action—I am not deciding the motion, but in this practice of the defendant here, as alleged in the complaint, a loss will result, and a loss probably has resulted because of the advertisement, and because of the cut in prices, that is substantially the position of the plaintiff, is it?

"Mr. Kohn [plaintiff's attorney] Yes.

"Mr. Schultz [defendants' attorney] This Court has no jurisdiction unless they can prove damage of $3,000 or more."

> of that sum. * * * But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof." * * *"

and at 279:

> "* * * the allegation of possible damage * * * is wholly inadequate, because * * * no intimation is given of the character or extent of the damage * * *. The respondent having failed to support the allegations as to amount in controversy the District Court should have dismissed the bill."

It is apparent that the district court erred in holding that the matter in controversy herein exceeds the sum of $3,000. The district court had no jurisdiction of this case. Illinois' courts are open to plaintiff.

2. On the record before us, we are not concerned with the principle of *res judicata*. Neither in this court nor in the district court did plaintiff urge that that principle applied to the district court's finding in favor of its jurisdiction, as contained in its order for the issuance of a preliminary injunction.

In *Murrell* v. *Stock Growers' Nat. Bank of Cheyenne*, 74 F. 2d 827, at 832, the court said:

> "A party may waive his right to assert the conclusiveness or bar of a judgment under the doctrine of res judicata."

To the same effect, see 50 C. J. S. 15 and 389.

Not only was the rule of res judicata not relied on by plaintiff in the district court, but that court proceeded to determine anew that it had jurisdiction, when it conducted the hearing which culminated in the judgment from which the present appeal was taken. Several circumstances make this clear. It was stipulated by counsel that all the testi-

mony taken on the hearing for a preliminary injunction should be used on the final hearing of the case. This included testimony of Lind and Teece, which in large part was offered to establish jurisdiction. The remarks of the district judge indicate that he felt that his ruling on jurisdiction at the preliminary hearing was correct and that he was ruling the same way upon the final hearing. He thereupon made a finding of fact that the matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000 and he entered a conclusion of law that the court had jurisdiction of the subject matter of the action.

In plaintiff's brief it is frankly stated:

> "Upon defendants' appeal from the preliminary injunction entered in this cause, this Court held that the District Court's finding of fact that federal jurisdiction existed was supported by the evidence (221 F. 2d 815, 819). *After the trial on the merits the same finding was made upon the same evidence.* * * *" (Italics supplied.)

These circumstances show that no one contended in the final hearing that the court's order for a preliminary injunction barred it from making, nor that it did not make, an independent adjudication on the matter of jurisdiction at the time of the final hearing.[4] We, therefore, have a right on this appeal to review the correctness of the latter decision.

For the reasons hereinabove set forth the judgment of the district court is reversed.

JUDGMENT REVERSED.

4. On the prior appeal, 221 F. 2d 815, 819, we said:

> "While considerable evidence was received by the district court, a final hearing upon the issues did not take place. The evidence was received so that the court might have an opportunity to exercise its discretion upon the motion for temporary injunction. * * *"

FINNEGAN, *Circuit Judge*, Dissenting. Actually this is an action by Seagram Distillers Corp. to enjoin the multiple defendants from advertising, offering for sale or selling Seagram products at less than the prices stipulated from time to time in accordance with the Fair Trade contracts entered into by Seagram Distillers Corporation in the State of Illinois. A preliminary injunction was granted below and we affirmed that restraining order. 221 F. 2d 815. After our remand the parties stipulated in the district court:

> "Plaintiff is, and at all times mentioned in the complaint has been engaged throughout the United States and Illinois, in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Said beverages (sometimes hereinafter referred to as 'Seagram products') include Seagram's V. O., Seagram's Seven Crown Blended Whiskey and Seagram Ancient Bottle Gin, and are sold in various sized bottles, the labels or containers of which bear the trade marks, brands or names of Joseph E. Seagram & Sons, Ltd., Joseph E. Seagram & Sons, Inc. or of corporations affiliated with said corporation, which are the producers thereof. Each of the beverages is, and during all of the times mentioned in the complaint was, in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed throughout Illinois. Plaintiff herein has for several years prior to the dates mentioned in the complaint expended large sums of money in advertising Seagram products and during the past several years plaintiff expended for such purpose an amount in excess of Five Hundred Thousand Dollars ($500,000.00) in Illinois alone, and the trade marks, brands or names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois and plaintiff has sold large quan-

> tities of each of said products in Chicago and throughout Illinois.
>
> Plaintiff is and continuously, since long prior to the dates mentioned in the complaint, has been the sole person authorized by the producers of Seagram products to sell and distribute said products in Illinois, and has during all of said time made sales of said products to various wholesale distributors throughout Illinois.
>
> Plaintiff has executed so-called Fair Trade contracts with large numbers of retailers of alcoholic beverages in Illinois. A copy of the form of said executed contracts is attached hereto as Exhibit A."

That, in my judgment, is not merely an ineffectual stipulation to confer jurisdiction on the district court, but rather a stipulatio of the matter in controversy. Plaintiff's vice-president, Teece, in charge of Central Division of Seagram-Distillers Corporation testified in substance during the preliminary injunction hearings that his company spent in excess of $300,000 for advertising promotion and outdoor signs in Illinois, all in connection with Seagram products. Use of that first record was authorized by order of this court based on the parties' agreement.

Plaintiff brought this action to protect good will manifested under paragraph 3 of the stipulation, quoted above. But I refrain, for the purposes of this dissent from reaching other points raised by defendant's appeal which incidently are far more serious than the short treatment accorded them by the majority.

Under 28 U. S. C. § 1332 "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States . . ." "By matter in dispute," Mr. Justice Field wrote in *Smith* v. *Adams*, 130 U. S. 167, 175 (1889) "is meant the subject of litigation, the matter upon which

the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed . . ." Starting with *Glencoad Light Co.* v. *Mutual Light Co.*, 239 U. S. 117 (1915) there is a line of decisions in various federal courts, permitting "the jurisdictional amount to be calculated on the basis of the property right which is being injured." *John B. Kelly* v. *Lehigh Nav. Coal Co.*, 151 F. 2d 743, 746 (8th Cir. 1945); *First English L. Church* v. *Evangelical L. Synod*, 135 F. 2d 701 (10th Cir. 1953); *Purcell* v. *Summers*, 126 F. 2d 390 (4th Cir. 1942). And several of the district judges in our own circuit have thought that in Fair Trade cases the jurisdictional amount is measured by the value of the right to be protected. *See e. g. Calvert Distillers Corp.* v. *Rosen*, 115 F. Supp. 146 (D. C. Ill. 1953).

McNutt v. *General Motors, etc., Corp.*, 298 U. S. 178 (1936) rests upon an attack directed at a regulatory statute. There General Motors sought to restrain enforcement of an Indiana Act regulating the business of purchasing contracts arising out of retail installment sales. In the case before us we are not dealing with state taxation or its regulatory authority but with an alleged invasion by the defendants of a right asserted by plaintiff. If the plaintiff's alleged right fails because of some defect in the Illinois Fair Trade Act that is something else and should be faced. But to stop short and reverse this case on the mechanical basis of a tenuous determination of the jurisdictional dollar sign is an approach I refuse to pursue.

APPENDIX B.

Preliminary Injunction and Supporting Findings.

(from I R. 30-35.)

IN THE UNITED STATES DISTRICT COURT.

* * (Caption—No. 54 C 832) * *

ORDER.

This cause coming on to be heard on motion of Seagram-Distillers Corporation, plaintiff herein, for a preliminary injunction, upon plaintiff's verified amended complaint, the verified answer of defendants and the affidavit of Edward M. O'Brien filed herein in support of plaintiff's motion for a preliminary restraining order, and upon the evidence introduced by the parties in open Court, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. Defendants are engaged in the business of selling alcoholic beverages at retail at various locations in Chicago, Illinois, except for the defendant Foremost Promotions, Inc., an Illinois corporation, engaged in the business of promoting the sale of alcoholic beverages sold at retail by the other defendants at their various stores and in preparing and causing to be published advertisements for the sale of such alcoholic beverages on behalf of said defendants, among which advertisements was the advertisement in the June 15, 1954 edition of the Chicago Sun-Times complained of herein.

2. Plaintiff is and has been engaged in the State of Illinois for more than fifteen years in the business of dealing in, selling and distributing alcoholic beverages of standard quality produced by Joseph E. Seagram & Sons, Ltd., Jo-

seph E. Seagram & Sons, Inc., and corporations affiliated with said corporations. Plaintiff is the sole person authorized by said producers to sell and distribute Seagram products in Illinois and sells the same to licensed distributors only. Said beverages, hereinafter referred to as Seagram products, include Seagram's V. O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, are sold in various sized bottles bearing the trade-marks, brands and names of the producers thereof, and are and have been in free, fair and open competition with commodities of the same general class, produced by others, and sold and distributed in Illinois. It has in the past three years expended approximately $3,000,000 in advertising and promoting the sale of Seagram products in Illinois and the trade-marks, brands and names under which Seagram products are sold have become widely and favorably known to the trade and public generally in Illinois.

3. The matter in controversy herein, exclusive of interest and costs, exceeds the sum of $3,000.

4. Plaintiff is a Delaware corporation. The corporate defendants are Illinois corporations and the individual defendants are all citizens and residents of the State of Illinois.

5. Plaintiff long prior to the defendants' acts complained of in the Complaint executed numerous Fair Trade contracts in Illinois in accordance with the Illinois Fair Trade Act, which contracts are now in full force and effect. Sales of Seagram products in Illinois have been subject to the provisions of such contracts which provide that said Seagram products shall not be sold, advertised or offered for sale within Illinois below the prices stipulated by plaintiff in written schedules. Prior to the acts complained of defendants received schedules of the prices stipulated pursuant to such contracts, which prices have been in full force and effect since April 15, 1953.

6. Defendants, notwithstanding the provisions of said Fair Trade contracts and the prices stipulated by plaintiff in accordance therewith, and notwithstanding plaintiff's insistence that said defendants comply therewith, did on or about June 15, 1954, wilfully and knowingly advertise, offer for sale or sell Seagram products at prices below those stipulated therefor.

7. Unless enjoined, defendants intend to continue said conduct complained of, to the irreparable damage of the good will and business of the plaintiff herein and of the producers of said Seagram products, thereby impairing the value of the trade-marks, brands and names under which Seagram products are sold.

8. Such wrongful conduct of defendants if not enjoined will cause others dealing in Seagram products to fail to comply with the aforesaid Fair Trade contracts, will substantially decrease the volume of sales of Seagram products in Illinois, and will substantially impair the good will of the plaintiff and the good will of the trade-marks, brands and names of the producers of Seagram products, all to the great damage and financial loss of the plaintiff.

9. None of the matters complained of involves sales made by any officer acting under the order of any court, or sales for the purpose of closing out said defendants' stocks of Seagram products, or sales of products damaged or deteriorated in quality.

10. Plaintiff is and has been vigorous, fair and diligent in the enforcement and maintenance of its Fair Trade prices in Illinois by all appropriate methods, including many legal proceedings.

11. The evidence does not support defendants' asserted claim of abandonment by plaintiff of its Fair Trade program in Illinois or defendants' claim that plaintiff has unreasonably failed and refused to take appropriate action

against retail dealers alleged to have been selling Seagram products at prices below those stipulated by plaintiff in accordance with its Fair Trade contracts.

12. The irreparable injury to the good will and business of plaintiff which would be suffered by it if defendants are not enjoined from advertising, offering for sale and selling Seagram products at less than the Fair Trade prices stipulated therefor, during the period prior to final adjudication herein, would be substantially greater than any loss or damage which could then be suffered by defendants as the result of the issuance of an injunction.

13. A preliminary injunction is necessary to preserve the *status quo* now existing until the final determination of the controversy herein.

Conclusions of Law.

1. The Court has jurisdiction of all the parties and of the subject matter of this action.

2. The Illinois Fair Trade Act is valid and constitutional.

3. Plaintiff's Fair Trade contracts entered into with numerous retailers in Illinois are valid and conform to the requirements of the Illinois Fair Trade Act and applicable federal law and Seagram products are sold and distributed by plaintiff in Illinois in accordance with said Fair Trade contracts.

4. The advertising, offering for sale or selling of Seagram products below the Fair Trade prices stipulated therefor is in violation of the Fair Trade contracts entered into by plaintiff and is in direct violation of plaintiff's rights thereunder and under the Illinois Fair Trade Act, and such advertising, offering for sale and selling of Seagram products by defendants should be restrained and enjoined.

5. Plaintiff is and has been reasonably, fairly and diligently enforcing its Fair Trade prices in Illinois by all appropriate means, and has not abandoned or waived its Fair Trade program in Illinois.

6. Plaintiff has no adequate remedy at law.

7. The action and threatened action of the defendants in advertising, offering for sale and selling Seagram products at less than the prices stipulated therefor pursuant to said Fair Trade contracts will result in direct, immediate and irreparable injury to plaintiff, and it is therefore entitled to equitable relief.

8. There is a reasonable probability that plaintiff will prevail upon the final determination of the controversy herein.

9. The balance of convenience or injury is resolved in favor of plaintiff and a preliminary injunction is necessary to prevent irreparable injury to it.

It is Ordered, Adjudged and Decreed that pursuant to stipulation, David Feltzer and Foremost Promotions, Inc. shall be and they hereby are substituted in the amended complaint for defendants Winifred W. Cash and Foremost Liquor Stores, Inc., respectively, and the appearance and answer filed by certain defendants on June 15, 1954 shall stand as the appearance and answer of said defendants David Feltzer and Foremost Promotions, Inc.

It Is Further Ordered, Adjudged and Decreed that

New Cut Rate Liquors Inc.
B & B Liquors, Inc.
Albert Vaitaitis
Harry Silverman
Jack Lavine and Robert Lavine
David Feltzer
Sam Malkin and Maurice Robin
Henry Newman and Rebecca Newman
James L. Horan

Milton M. Chemers
Nick Pintozzi
Thomas Pape
Frank Pintozzi
Ed's Liquors, Inc.
Diversey Liquors Corporation
Friendly Liquor Mart, Inc.
Octavio Narcisi, Nick Brunetti and Feliz Giannattasio
Glenn Liquor Co. Inc.
Binstein, Inc.
Lena Paterno
Jesse Bergandi and Frank Bergandi
Martin R. O'Connor and Martin F. Conroy
Healie Schwartz and Louis Schwartz
Jack Lavine and Myer L. Fellars
Bill and Rose Ridell
Westown Liquors, Inc.
26th and Kedzie Liquor Co. Inc.
Ontario Pharmacy, Inc.
Leon H. Phillips
McCoy Liquor Stores, Inc.
The Real McCoy, Inc.
Roosevelt Wines & Liquors, Inc.
Morris Rubin
Jack Segal
Stanley Lutz
Soifer & Sons, Inc.
Sun Pay Less Drugs, Inc.
Sun Cut Rate Drugs, Inc.
Sun Self-Serv, Drugs, Inc.
Leonard L. Freeman
Betty Malkin
James Castaldo
The Malkin Company, Inc.
Harry Schwarzbach
Lawrence & Western Wines & Liquors, Inc.
Foremost Promotions, Inc.
Sam Rosen
Jack Kanarish
Jack W. Kerschner
Sylvia, Leonard and Leonore Robins

defendants herein, their agents, servants, employees, attorneys, successors and assigns, and each and every one of them be, and they are hereby jointly and severally enjoined and restrained from wilfully and knowingly advertising, offering for sale or selling Seagram products, including but not limited to Seagram's V.O., Seagram's Seven Crown Blended Whiskey and Seagram's Ancient Bottle Gin, in Illinois, at less than the prices stipulated by Seagram-Distillers Corporation from time to time under the Illinois Fair Trade Act and in accordance with contracts made pursuant to said Act, which contracts at the time of the filing of the complaint herein were, now are or may hereafter be in force in Illinois relating to the sale or resale of any of said Seagram products in that state.

It Is Further Ordered that the bond heretofore filed by plaintiff pursuant to the temporary restraining order of this Court shall stand as a penal bond for the payment of such costs and damages as may be incurred or suffered by any party who shall be found to have been wrongfully enjoined or restrained, and that this preliminary injunction remain in full force and effect until the final hearing of this cause and until further order of this Court.

Enter this 2nd day of July, 1954:

JULIUS J. HOFFMAN,
Judge.

APPENDIX C.

Statutes Involved.

28 U. S. C. A. § 1332

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

ILLINOIS FAIR TRADE ACT

Ill. Rev. Stat. (1955), c. 121½, §§ 188-191.

AN ACT to protect trade mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a trade mark, brand or name.

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity re-

quire upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(1) In closing out the owner's stock for the purpose of discontinuing delivery of any such commodity: provided, however, that such stock is first offered to the manufacturer of such stock at the original invoice stock price, at least ten (10) days before such stock shall be offered for sale to the public.

(2) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(3) By any officer acting under the orders of any court.

Sec. 2. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section 1 of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 3. This Act shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

The provision of this Act shall not apply to any contract or agreement relating to any commodity for library purposes which may be sold or offered for sale to the State of Illinois or to any of its administrative agencies or political subdivisions, or to any municipality, or to any free public library, endowed library, college, university, or school library in this State.

Sec. 4. This Act may be known and cited as the "Fair Trade Act."

Office - Supreme Court, U.S.
FILED
AUG 23 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 353

SEAGRAM-DISTILLERS CORPORATION,
Petitioner,

vs.

NEW CUT RATE LIQUORS, INC., et al.,
Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondents submit that this Court should deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, reversing the order of the United States District Court for the Northern District of Illinois, Eastern Division. The order of the District Court, which was reversed, granted the Petitioner a permanent injunction in a diversity of citizenship case, involving alleged violations by the defendants of a Fair Trade contract, entered into pursuant to the provisions of the Illinois Fair Trade Act.

QUESTIONS PRESENTED.

Petitioner did not properly present the issues. The issues are:

1. Whether in a diversity of citizenship case, wherein plaintiff is seeking a permanent injunction against defendants for alleged violation of a Fair Trade contract entered into pursuant to the provisions of a State Fair Trade Act, the jurisdictional amount is measured by the value of the sum spent in building good will?

2. Whether plaintiff introduced competent evidence, and carried the burden of proving that the matter in controversy, exclusive of interest and costs, exceeded the sum of $3,000.00?

STATEMENT OF THE CASE.

The statement of the case is adequate except for the following:

1. At page 5 of the petition, it states:

> "Even though plaintiff's wholesale prices were considerably lower than the retail, the decline in plaintiff's sales would obviously have greatly exceeded $3,000."

This statement belongs in the Argument of the Petition, and not in the Statement of the Case.

2. Petitioner's analysis of the decision by the Circuit Court of Appeals is erroneous. The Court of Appeals ruled in substance that—

(a) Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business.

(b) The damage to plaintiff's good will caused or threatened by defendants' acts is the subject of controversy in this case.

(c) Plaintiff has failed to prove any facts by *competent proof* showing what, if any, curtailment of business, and consequent loss, have been or are likely to result from defendants' acts.

(d) It is improper, in the absence of *competent proof*, of the amount of damage sustained or threatened, to look at the evidence of what was spent in building good will and then, if the amount is substantial, to surmise that the amount of the loss is $3,000.00 or more.

(e) The District Court did not note that, when the $3,000 requisite for jurisdiction is challenged in an action brought in a federal court for the protection of a right belonging to plaintiff, there is an important distinction between two classes of diversity cases.

(1) In one class, a plaintiff charges wrongful acts by a defendant, or by several defendants acting jointly, which have injured or damaged, or will injure or damage, a right for which plaintiff seeks protection. In such a case, if plaintiff shows that the alleged injury or damage caused or threatened by a defendant, or by several defendants acting jointly, amounts to at least $3,000, the federal court has jurisdiction.

(2) In the other class of diversity cases, a plaintiff charges wrongful acts by defendant, or by several defendants acting jointly, which, if not prevented, will completely deny or destroy the right for which plaintiff seeks protection. In such a case, if plaintiff shows that the right is worth at least $3,000, the federal court has jurisdiction.

REASONS WHY WRIT OF CERTIORARI SHOULD BE DENIED.

A.

Petitioner's Bases for Granting The Writ:

(1) The Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have held that where the right sought to be protected was plaintiff's trade name, the value of the good will represented by the trade name established the amount in controversy.

(2) The Fair Trade Acts, like the trade name cases, are designed to protect the good will inherent in the trade name. The case of *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, and *KVOS* v. *Associated Press*, 299 U.S. 269, which were adopted and followed by the Circuit Court of Appeals, justified the court in ruling that the evidence as to large amounts spent for advertising, and the volume of sales, established that the good will in plaintiff's trade name far exceeded $3,000 in value; that this was also true as to the value of the right of plaintiff to have its products sold at the stipulated price.

(3) That the decision of the Circuit Court of Appeals is inconsistent even with its own theory, since uncontradicted evidence shows that plaintiff suffered much more than $3,000 in damages from defendants' price cutting; also, that the evidence introduced by plaintiff in this case is far stronger than that held by the First Circuit to be sufficient in *Lee-Wilson* v. *General Electric Co.*, 222 F. 2d 850 (C.A. 1, 1955).

B.

Respondents' Bases for Denying The Writ.

1. (a) and (b) There is a vital distinction between a set of facts wherein the right sought to be protected is plaintiff's trade name, as compared to a set of facts wherein plaintiff charges wrongful acts by a defendant, have injured or damaged, or will injure or damage, a right for which plaintiff seeks protection. When the right sought to be protected is plaintiff's trade name, defendant's wrongful acts may completely deny or destroy the right for which plaintiff seeks protection; consequently, the courts have properly ruled that under such circumstances the business reputation or good will attached to the trade name is an intangible asset to be taken into consideration in ascertaining the value of the right to be protected. However, in the instance of alleged violation of a Fair Trade contract executed pursuant to the provisions of a State Fair Trade Act, the right sought by plaintiff to be protected is the right of plaintiff to have its products sold at the stipulated price. It is this right which Petitioner requested the lower courts to protect. The value of this right can be measured only by the loss, if any, which would follow as a result of defendants' failure to sell plaintiff's products at the stipulated Fair Trade prices. Defendants' acts did not prevent plaintiff from using its good will in the conduct of its business; whereas, in the instance of a plaintiff's desire to protect the right to use its trade name, plaintiff is directly prevented from using its good will in the conduct of its business. *McNutt* v. *General Motors Acceptance Corp., supra,* and *KVOS* v. *Associated Press, supra.*

2. Petitioner attempts to reconcile the *McNutt* and *KVOS* cases, *supra,* with this case, and on page 14 of its Petition, states:

> "*But in those cases* [McNutt & KVOS], *plaintiff proved the value of the wrong right.*" (Italics supplied by Petitioner) (Words in brackets supplied.)

At page 15, Petitioner continues:

> "Here plaintiff's evidence as to large amounts spent for advertising and the volume of sales—even apart from but certainly in combination with the evidence that retailers would take Seagram's products 'off the shelf' and that sales would be substantially curtailed—established that the good will in plaintiff's trade names far exceeded $3,000 in value, and also that this was true as to the value of the right of plaintiff to have its products sold at the stipulated prices."

It is obvious from Petitioner's argument that *it also attempts to prove the wrong right.* Respondents have no argument with Petitioner that the good will of plaintiff's brand names far exceeds $3,000 in value; but defendants' acts did not prevent plaintiff from using its good will in the conduct of its business; consequently, the good will in Petitioner's brand names is not the subject of controversy. The subject of controversy in this case is the damage to Petitioner's good will caused or threatened by defendants, as a result of the defendants' refusal to sell plaintiff's products at the stipulated Fair Trade prices. *McNutt* v. *General Motors Acceptance Corp., supra,* and *KVOS* v. *Associated Press, supra.*

3. Petitioner contends that the court failed to construe all of the evidence bearing upon the jurisdictional amount and erred in reversing the District Court's finding of fact that the amount in controversy exceeds $3,000, exclusive of interest and costs.

(a) In support of its position, Petitioner sets forth certain testimony given by Teece (Pet., p. 16) and Lind

(Pet., p. 17). Petitioner, however, failed to state that Teece and Lind were both permitted to give this testimony over the objections of the defendants (I.R. 84) (I.R. 101). Defendants contended this testimony was not competent. These witnesses were asked to testify to ultimate conclusions which could only be drawn by the District Judge in determining the jurisdictional issue in this case, based upon competent evidence. *Hairgrove* v. *City of Jacksonville,* 366 Ill. 163, 182. In addition, the questions of Petitioner's counsel called for speculation, conjecture, and surmise. We submit that the testimony of Teece and Lind, referred to by Petitioner, was not competent to prove the jurisdictional issue. In *McNutt* v. *General Motors Acceptance Corp., supra,* the court at page 189 stated:

> "The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by *competent proof.*" (Italics supplied.)

(b) The principles of law set forth in *Lee-Wilson* v. *General Electric Co., supra,* which is cited by Petitioner as authority for the acceptance of the type of evidence which was introduced in this case, do not apply, because in the *Lee-Wilson* case the issuance of a preliminary injunction was involved; whereas, in this case the issuance of a permanent injunction is involved. At page 853 of the *Lee-Wilson* case, the court said:

> "* * * the district court * * * heard and denied the motion to dismiss prior to issuing the temporary injunction. At such hearing, both the plaintiff and the defendant were content to rest upon the verified bill

and the motion. As above pointed out, the plaintiff at that stage had made a sufficient showing to justify the district court in holding on to the case and issuing the temporary injunction. If the district court, in setting down the motion for hearing, had indicated that that was to be a final full-dress hearing on all issues of fact or law bearing on the existence of the jurisdictional amount, the parties would have had then a last chance to produce all the evidence they had bearing on the jurisdictional issue. In the present case we do not gather that the hearing on the motion to dismiss was of this nature; hence, at some future point in the proceeding, perhaps at the final hearing, if the defendant's answer denies the truth of the formal allegation of jurisdictional amount and of the further allegations of the complaint in support thereof, this issue may again be before the court for determination, with another opportunity afforded to the parties to introduce competent evidence on this issue. But of course the burden of proof will remain upon the plaintiff."

It is obvious from the above that the *Lee-Wilson* case has no bearing whatsoever on this case.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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